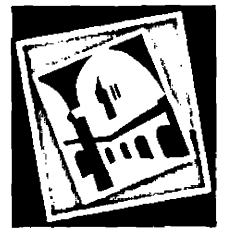


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EUROPEAN UNIVERSITY INSTITUTE

Bernhard Knoll

# UNITED NATIONS *IMPERIUM*

THE LEGAL STATUS OF TERRITORIES SUBJECT TO THE ADMINISTRATION OF  
INTERNATIONAL ORGANISATIONS

THESIS SUBMITTED WITH A VIEW TO OBTAINING THE DEGREE OF  
DOCTOR OF LAWS OF THE EUI

SUPERVISOR:  
PROF. PIERRE-MARIE DUPUY

AUGUST 2005

FLORENCE

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ROSSO

# **EUROPEAN UNIVERSITY INSTITUTE**

Department of Law

Bernhard Knoll

## **United Nations *Imperium*:**

**The Legal Status of Territories Subject to the  
Administration of International Organisations**

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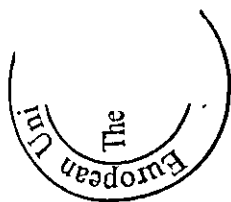
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Autumn 2005

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<sup>1</sup> Introduction to *The Blood of Guatemala. A History of Race and Nation* (Duke UP, 2000).

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# ABSTRACT

The growing number of international organisations involved in 'state-building' and the scope of authority they exercise raises a number of important questions under international law – as to the status of UN-administered territories, the nature of UN authority, its legal basis in the UN Charter, and its limitations, for example. By looking at the ways through which international authority carries out internationalisation projects, the thesis aims to explain how legal instruments were designed in order to respond to a spatio-temporal need of the international community. It adopts a broad topological style which interrogates where and how to 'locate' the background assumptions guiding the idea of international fiduciary administration, in legal and philosophical space.

By supplying complementary theoretical frameworks to account for instances of suspended sovereignty, the thesis presents a synoptic vision of the notion of internationalisation of territory and the extent to which multilateral institution-building missions share features with, and can be distinguished from, projects undertaken under the Mandate- and Trusteeship systems. It utilises institutions of both private law (agency, trusteeship, servitude) and public law (wardship, the status of organs) to analyse the dual nature of international administrations. Firstly, an international administration represents a non-state territorial entity on the international plane as *agent ex lege*. Second, the thesis investigates the *organic framework* through which an ancillary organ of the UN dispenses temporary political authority in order to carry out the functions, and meet the needs, of the international community. The constructive approach to international legal personality solidifies the argument that a non-state territorial entity administered by the international community may base its claim towards partial personality on a legal argument.

The doctorate follows a trajectory that outlines the phenomenon of 'dual functionality' throughout colonialism, trusteeship administration, military occupation and territorial administration on the basis of an international mandate. The notion of the fiduciary bond underpin all examples which illustrate that the more 'international' the mandate of a territorial administration, the more pronounced its assumption of agency and pursuit of the 'territorial' interest. Both frames are applied to the UN Council for Namibia and to the United Nations Interim Administration Mission in Kosovo (UNMIK). The tensions resulting from the simultaneous performance, by the same actor, of the functions of territorial agent and international organ accompany the investigation into the status of Kosovo in public international law. Moreover, the thesis examines certain inherent shortcomings to an 'open-ended' institution-building operation where the future status of the entity *in statu nascendi* remains undecided. Focusing on the internal political and legal order of an internationalised territory, the thesis notes that the rule of an international administration is subject to an 'anomalous' legitimacy cycle. The fundamental indeterminacy of law, gaps in statutory instruments and in human rights protection further expose the frailty of transitional administrations.

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## INTRODUCTION

*'The United Nations is, for good reasons, reluctant to assume responsibility for maintaining law and order, nor can it impose a new political structure or new state institutions.'*<sup>2</sup>

*'What we are involved in is nothing else than building up the whole state from scratch.'*<sup>3</sup>

*'United Nations Imperium: The Legal Status of Territories Subject to the Administration of International Organisations'* is the result of three years of research at the European University Institute in Florence, including one semester which I spent at Madison Law School. The idea behind the work presented here and submitted for review in August 2005 was conceived in Prishtina, Kosovo, in the winter of 2001. My daily professional exposure led me to apply for a grant at the EUI, emerging out of an urge to reflect more profoundly upon some of the legal implications of 'political trusteeship', and particularly on the assumption of temporary *imperium* over territory by the United Nations. In the hectic environment of the Office of the Chef de Cabinet in the OSCE Mission, I came to realise that a background theory for institution-building had to be found somewhere out there. Only a strong theoretical grounding, I believed, could provide a recipe for good practice, whether in Kosovo or in Afghanistan.

In fact, there is nothing like a 'grand theory', nor do institution-building models wait on shelves, ready to be picked up on demand. Rather, as Šelo correctly observes in her thesis on international institution-building in Bosnia, such models are "crafted through trial and error process, sculptured by a long succession of moves, deadlocks, and breakthroughs".<sup>4</sup> However, back in that long winter of 2001 in Prishtina, I decided to analyse aspects of the evolution of international law and the ways in which it has devised various models of international administration. Ensuing conversations with friends and colleagues (which would prove most inspiring for applying to the EUI) gravitated around some of the concepts that appear and re-appear throughout this thesis: title to territory, self-determination, sovereignty, internationalism, rule of law, fiduciary obligation, ownership, legitimacy, sacred trust, legal personality, and so forth. All these key terms turned out to appear in the writing of scholars who pronounced, eight decades ago, on the 'experimentalism' with which the League of Nations had pursued its respective internationalisation projects. From this historical perspective, the idea of a re-appearance of trusteeships in the context of countering threats to international peace and security provided encouragement to probe deeper into the background assumptions underlying the concept of 'internationalisation'.

Every research design involves trade-offs, and this thesis is no exception. The LL.M. proposal I sent to the EUI dealt with human rights protection in a 'stateless state' and my

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<sup>2</sup> Boutros-Boutros-Ghali, *Supplement to An Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations*, UN Doc. A/50/60-S/1995/1 (3 January 1995), §14.

<sup>3</sup> Kosovo-based OSCE official, cited in Patrick Smyth, 'In Kosovo Everything From Teachers to Power Workers Must Be Provided', *Irish Times* (9 November 1999), at 14.

<sup>4</sup> Senada Šelo Šabić, *State-Building Under Foreign Supervision: Bosnia-Herzegovina 1996-2003* (Ph.D. thesis, on file with the EUI, 2003), at 121.

thinking (in the wake of the Strasbourg Court's decision in the *Banković* case and drawing from its reasoning in the *Loizidou* dictum) that the ECHR could possibly be applied extra-territorially, thus vesting the population under international tutelage with an additional protective instrument. Looking at the thesis as it now stands – or, more accurately, as it lingers in its final stages – disappointingly little analysis is offered on the issue of human rights protection in Kosovo. The work also falls short of my initial expectations of closely examining the sphere of international responsibility of international organisations for wrongful acts – an issue currently under consideration by the International Law Commission – which I meant to apply to the UN as it assumes more and more functions in administering territory. The reason for these shortcomings is I felt that the necessity to address the – usually overlooked – conceptual problems underpinning the temporary internationalisation of territory overrides my quest to answer these specific questions of public international and European human rights law.

Thus I began my work where all lawyers are meant to start: at the question of legal basis. My initial intention to examine the conceptual assumptions underlying the internationalisation of territory (specifically those concerning international agency) in a brief and succinct manner gradually ceded to a fascination with the phenomenon of the dual functions an international trustee is mandated to pursue and the ways in which international law reaches the subjects of its concern 'directly', without the intermediation of sovereignty. Predictably, the more intensive my investigation into general issues of fiduciary administration grew, the less I concerned myself with the 'concrete' legal problems of human rights protection and responsibility. Now, as I re-read the initial research proposal which I found loitering in the depths of my laptop, I was briefly under the impression that I had chanced upon another person's outline. This is of course not the case. Yet, as most students discover who are engaged in a writing project of this magnitude, I came to realise that research opens a surprising number of doors behind which lurk beasts and problems of diverse colour and *Gestalt* whose appeal is bound to hold one's intellect hostage for months.

A thematical preface introduces the reader to the discursive fields in which the issues under consideration undergo current academic treatment. I shall mention two related discourses in the following section. One concerns the ways in which generic tools and models for reconstructing societies can be assembled and applied across the board. The other relates to the exercise of new competencies by the international community and the use of terminology to describe some of its excesses.

#### (I) INTERNATIONAL ADMINISTRATIONS AND THE DISCOURSE OF EMPIRE

Since the mid-1990s, the United Nations and other multilateral bodies have increasingly asserted authority for the administration of war-torn territories. The far-reaching engagement of the UN in the process of state and institution-building was the result of an increased multilateral and civilian effort to create democratic institutions and market economies as a basis for sustainable peace in societies exiting conflict. As such, these efforts were facilitated by a changed architecture of security in the post-Cold War era<sup>5</sup> and the complementary

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<sup>5</sup> Cf., generally, Richard Haass, *Intervention. The Use of American Military Force in the Post-Cold War World* (Washington, D.C.: Carnegie Endowment, 1999), 16; Karin von Hippel, *Democracy by Force. US Military Intervention in the Post-Cold War World* (New York: CUP, 2000), at 10; and

redefinition of the notion of 'threat to the peace' in Article 39 of the UN Charter, resulting in an extension of the Security Council's (SC) enforcement powers to internal armed conflicts and grave humanitarian crises.<sup>6</sup> The authorisation of peace-building operations, characterised by a crescendoing use of powers under Chapter VII of the UN Charter and at the same time by an increasing willingness to apply diverse enforcement measures under Article 41, has grown both quantitatively and qualitatively.<sup>7</sup> This development occurred as chronic political instability, or even the outright implosion of states, posed a challenge to the international legal order.

The growing number of international organisations involved in 'state-building' and the scope of authority they exercise raises a number of important questions under international law – as to the status of UN-administered territories, the nature of UN authority, its legal basis in the UN Charter, and its limitations, for example. Among scholars, these new approaches to conflict management have ignited a debate over the fundamental purposes of such practice and the extent to which policy-making towards those ends can be improved. In this discourse, it has become commonplace to observe that in the life-cycle of an international territorial administration, there will come a time when the domestic political system has developed to the point where local politicians become critical and suspicious of the continued exercise of the international organ's discharge of public authority. Their ensuing calls for an end to foreign dominance generates vastly different responses. They may be addressed by a continuous devolution of power (as in East Timor under international tutelage), or they may be answered with a renewed assertion of international power (as exemplified in Bosnia in its tenth year under close international supervision).

A cursory review of relevant literature indicates that the 'rule by decree' approach to international institution-building has lost much of its appeal. Critics have compared the IC's reassertion of authority in Bosnia to the British Raj in early nineteenth-century India, likening the international High Representative to an "uncomfortable caricature of a Utilitarian despot".<sup>8</sup> There, the ongoing imposition of legislation is seen to deprive local political institutions of any responsibility and reduces elected assemblies to toothless bodies rubberstamping legislation not of their own making. Referring to its transitional administration of East Timor, Chopra analogised the competences of the Special Representative of the UN Secretary-General to those of "a pre-constitutional monarch in a sovereign kingdom"<sup>9</sup> where models of good governance are developed through the discharge of 'benevolent despotism'. Likewise, Justice Goldstone concluded that an overbroad international authority in Kosovo would be "a

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James Dobbins et al., *The UN's Role in Nation-Building. From the Congo to Iraq* (RAND Corporation, 2005).

<sup>6</sup> For a general discussion cf. Dan Sarooshi, *The United Nations and the Development of Collective Security. The Delegation by the Security Council of Chapter VII Powers* (Oxford: OUP, 1999).

<sup>7</sup> For enforcement measures cf. David Schweigman, *The Authority of the Security Council under Chapter VII of the UN Charter. Legal Limits and the Role of the International Court of Justice* (The Hague: Kluwer Law, 2001), at 51.

<sup>8</sup> For a 'neo-Burkean' critique of the interventionist paradigm interpreted as imperialist concept in disguise, see Gerald Knaus and Felix Martin, 'Travails of the European Raj: Lessons from Bosnia and Herzegovina', 14:3 *Journal of Democracy* 60-74 (2003), 66-67. Cf. also European Stability Initiative, *Reshaping International Priorities in Bosnia and Herzegovina. Part 2: International Power in Bosnia* (March 2000).

<sup>9</sup> Jarat Chopra, 'The UN's Kingdom of East Timor', 42:3 *Survival* 27-36 (2000), at 27-28.

mistake of the colonial mentality".<sup>10</sup> From this vantage point, the internationally supervised political reconstruction of Kosovo and Bosnia appears evocative of the 'White Man's Burden' that proved a powerful justification of nineteenth century empires.<sup>11</sup>

Recent criticisms of the international administration of territory follow a thread of thought that can be traced back to *Edmund Burke's* eloquent formulation of the fiduciary duties of a colonial power, and the notions of accountability the latter must be subject to.<sup>12</sup> Following *Burke*, present writing on the topic is mostly concerned with elaborating the argument that progress towards developing democratic structures is, through a process of local mimicry, bound to remain slow and incomplete if the means employed towards that end resemble authoritarian administration.<sup>13</sup> *Chesterman* phrases what he believes to be the central policy dilemma facing international administrations in the following way: "how does one help a population prepare for democratic governance and the rule of law by imposing a form of benevolent autocracy?"<sup>14</sup>

'Participatory' models that include both in-built provisions for establishing a partnership with local institutions and constitutional structures tying international authority into the long-term interest of the governed population are frequently invoked as potentially more successful in the medium term and more sustainable in the long run.<sup>15</sup> Recent treatments of this subject matter emphasise the importance of good governance, accountability and legitimacy in the context of the international community's transitional administration of territory. In what appears to be an onslaught representing the prevalent peace-building orthodoxy, *Ignatieff* critiques what he terms the 'neocolonialist' aspects of international territorial administration

<sup>10</sup> Goldstone quoted by Jacob S. Kreilkamp, 'U.N. Postconflict Reconstruction', 35 *NYUJILP* 619-670 (2003), at 668.

<sup>11</sup> For BiH, cf. David Chandler, *Bosnia: Faking Democracy After Dayton* (London: Pluto Press, 1999), at 64. Accordingly, Europe is regularly charged with 'postcolonial imperialism' in its neighbourhood. Cf., e.g., Ian Johnstone, *UN Peacebuilding: Consent, Coercion and the Crisis of State Failure. From Territorial Sovereignty Human Security* 186 (Canadian Council of International Law, 2000), at 196. A similarly stereotypical image of peace-building is painted by Roland Paris, 'International Peace-building and the "Mission Civilisatrice"', 28 *Review of International Studies* 637-656 (2002).

<sup>12</sup> Cf. Edmund Burke's celebrated speech in the House of Commons in support of Charles Fox's motion to abolish the East India Company's dominion in India (1 December 1783), 'The Writing and Speeches of Edmund Burke', in *India: Madras and Bengal* (vol. V ed. by P.J. Marshall, Oxford: Clarendon Press, 1981), at 385. See also Mark Lindley, *The Acquisition and Government of Backward Territory in International Law* (London: Longmans, 1926), at 330.

<sup>13</sup> Cf. Richard Caplan, *A New Trusteeship? The International Administration of War-Torn Territories* (Adelphi Paper 341, Oxford: OUP, 2002), at 54-55. To give another representative quote, Kreilkamp believes that the legacy of colonialism "suggests that total coercive control over distant regions, wielded by unaccountable individuals, is a poor recipe for 'building' sustainable, independent political structures" ('Reconstruction', *supra* note 10, at 668).

<sup>14</sup> Simon Chesterman, *You, the People. The United Nations, Transitional Administration, and State-Building* (Oxford: OUP 2004), at 127. Cf. also the Report by the Council of Europe Political Affairs Committee, *Strengthening of Democratic Institutions in Bosnia and Herzegovina* (Doc. 10196, 4 June 2004), §35. The report is an example of the excessive tone with which the CoE launches its diatribes against the High Representative. Referring to the HR's continuing authority to dismiss public officials that he finds in breach of the Dayton Agreements, the Rapporteur believes that "such powers run counter to the basic principles of democracy and are reminiscent of a totalitarian regime" (§39, emphasis supplied).

<sup>15</sup> Cf., generally, Ian Smillie (ed.), *Patronage or Partnership: Local Capacity Building in Humanitarian Crises* (Westport, Conn.: Kumarian Press, 2001); Thomas Carothers, *Aiding Democracy Abroad: The Learning Curve* (Washington, D.C.: Carnegie Endowment for International Peace, 1999); UNDP, *Development Dimensions of Conflict Prevention and Peace-Building* (study prepared by B. Wood, New York: UNDP, 2001).

and the tendency of international agents to 'perennialise' their stronghold over key competencies:

The United Nations once oversaw discrete development projects. Now it takes over political and administrative infrastructure of entire nations and rebuilds them from scratch... [T]here is an imperial premise at work here: Wealthy strangers are taking upon themselves the right to rule over those too poor, too conflict-ridden, to rule themselves. If it is...imperialism, is it benign? Only if it succeeds: if [the territory] learns to rule itself, then these well-paid agents of the international conscience do themselves out of a job. But no one knows if it will succeed. And the omens are not auspicious.<sup>16</sup>

These associations – 'benign imperialism', 'autocracy' reminiscent of a 'totalitarian regime', 'sovereign kingdom', 'dictatorship of virtue' – and the authorities that rule them – 'benevolent despot', 'pre-constitutional monarch', 'neo-colonial administration'<sup>17</sup> – have considerable appeal. They are easily comprehensible. Under closer scrutiny they do, however, harbour distinct and mutually exclusive identities. The fiduciary exercise of administrative powers with the authorisation of the UN Security Council differs significantly from imperial or colonial rule where tasks were carried out in the interest of the metropolitan power. Detached from the context of decolonisation, references to the alleged resurrection of the UN's Trusteeship system will also not suffice to capture the most important features of the phenomenon of internationalisation. As Bain observes, it is impossible to confirm the 'reality' of a resurrected practice of trusteeship on account of the extraordinary executive and legislative powers exhibited in cases that are in fact constitutionally different. The attempt to "trade on the paternal discourse of empire, which embraced trusteeship in a righteous mission of civilisation ordained by divine providence, is, in this particular context misleading".<sup>18</sup> One of the underlying themes of this dissertation will be that such metaphorical extensions are indeed ill-suited to capture the elusive phenomenon of international territorial administration and the peculiar ways in which it temporarily configures public life.

In a second, related discourse, it has become *en vogue* to proceed from Bosnia via Kosovo to East Timor (and extend the trajectory to Afghanistan and Iraq). The framework of international authority set up by the Dayton Peace Agreement for BiH is regularly juxtaposed with that of UN Security Council Resolutions 1244 and 1272(1999), mandating UNMIK and the UN Transitional Administration in East Timor respectively. Contrasting scopes of authority, operational aims, bureaucratic organisation, and endeavouring to cross-evaluate performance and measure the pace of devolution of competencies have become stalwart features of comparative studies of international institution-building.

Yet, finding reliable ways to gauge these items and analysing how they cluster at the level of whole polities usually proves difficult.<sup>19</sup> Comparing evidence of a policy's impact in one

<sup>16</sup> Michael Ignatieff, *The Warrior's Honor. Ethnic War and Modern Conscience* (New York: Henry Holt, 1997), at 79-80.

<sup>17</sup> All previous characterisations mentioned here appear in the literature quoted above, except 'dictatorship of virtue' (in: Robert M. Hayden, 'Why Political Union Cannot be Imposed by Foreign Powers. Bosnia: The Contradictions of "Democracy" Without Consent', 7:2 *EECR* (1998)).

<sup>18</sup> William Bain, *Between Anarchy and Society. Trusteeship and the Obligations of Power* (Oxford: OUP, 2003), at 148 and 149.

<sup>19</sup> As Schmitter aptly remarked in what amounts to a substantial self-critique of his quality-of-democracy research, "one type of organisation for which there exists data – whether it is trade

institution-building context with policies that are pursued under different local conditions is a tricky occupation indeed. The overwhelming number of items that would have to be correlated suggests that comparative studies can only explain the impact of a segment of institution-building policies. Notwithstanding such methodological difficulties, proponents of comparative studies in international institution and peace building are eager to move rapidly from the realm of theory and disputation to the task of 'getting on with reality'. Those who 'model' international administration have allowed themselves in a number of instances to over-promise and to arouse expectations that will not be fulfilled in the immediate future. Operating in a world over-eager for prompt results, they frame sweeping recommendations concerning 'ingredients' for successful peace-building by suggesting standardised socio-economic 'tool-kits' – or even 'standard operating procedures' – that should aid the development of liberal democracy in internationalised territories.<sup>20</sup> In short, the elaboration of a normative framework for multilateral intervention – very much aimed at conceiving modules for a 'Government out of the Box' – has undoubtedly become an academic growth discipline in which its exponents make passionate assessments of the impact of 'models' of international territorial governance.<sup>21</sup>

Passion is, however, a distortive lens that makes it hard to perceive the precise shape of things. By looking solely at 'output' variables, studies of international missions tend to ignore crucial aspects and dispositive issues that would contribute to a macro-performance analysis. As *Feldman* recently remarked, the assumption that successful institutions can be built on the basis of a menu of options in which the nation-builder chooses a "parliamentary system from column A, judicial review from column B, and a type of federalism from column C" is highly problematic.<sup>22</sup> While broad organisational templates may be transferable, a state-building project is sensitive to the nature of the recipient and the local body politic.

## (II) METHODOLOGICAL FRAMES AND STRUCTURE OF THE THESIS

The task I have set myself in writing this thesis is decidedly more modest. Its objective consists in interrogating the idiosyncratic character of trusteeship and the multifarious ways in which it became subjected to legal appropriation by international society in the twentieth century. In other words, this thesis is an exercise in exploring the legal background assumptions and frames that inform theories of international institution-building under temporary trustee administration. Its underlying objective is to rescue public international law

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unions or bowling societies – can be quite unrepresentative of collective actions that are occurring elsewhere in society" ('The Ambiguous Virtues of Democracy', 15:4 *Journal of Democracy* 47 (2004), at 50). However, for a useful analysis comparing such administrations' activities within sector-specific competencies, see Richard Caplan, *International Governance of War-Torn Territories. Rule and Reconstruction* (Oxford: OUP, 2005), at 45 *et seq.*

<sup>20</sup> For an example of such scattered analysis see Outi Korhonen and Jutta Gras, *International Governance in Post-Conflict Situations* (Helsinki: Forum Juris, 2001), at 145 *et seq.* For further examples of sweeping generalisations on the legitimacy of models of 'proxy governance' see, e.g., Fen O. Hampson, 'Can Peacebuilding Work?', 30 *Cornell ILJ* 701 (1997), at 707 *et seq.*

<sup>21</sup> Cf. the report of the high-level workshop organised by the Crisis Management Initiative, *State-Building and Strengthening of Civilian Administration in Post-Conflict Societies and Failed States* (Helsinki, September 2004), at 22 *et seq.* Regarding further suggestions to the UN to put together model legislation in 'framework packages' for an emergency legal system see also the recommendations in *Honoring Human Rights under International Mandates: Lessons from Bosnia, Kosovo, and East Timor* (Washington, DC: Aspen Institute, 2003), at 19.

<sup>22</sup> Noah Feldman, *What We Owe Iraq. War and the Ethics of Nation Building* (Princeton/Oxford: Princeton UP, 2004), at 143, note 23.



from its abduction by pragmatic management. This seems particularly appropriate as the international system is rapidly developing, and experimenting with, new forms of political authority which enable it to effectively respond and directly participate in the governance of such territories with a view to restructuring their domestic constitutional order.<sup>23</sup> A discussion of the spatial response of the international community, namely its imposition of a temporary international 'trusteeship', will form the outer margins of the thesis. However, the legal frameworks discussed cannot be analysed *in vacuo*. They are naturally related to, and have their basis in, the realm of *Vorstellungen* of how international society should be designed. In short, these conceptions are predicated upon two assumptions. The method of 'internationalisation' is informed by a substantive belief in the universality and rationality of international authority. As a corollary, internationalisation projects appear to be based on a paradigm that has its intellectual roots in what has been labelled liberal internationalism.<sup>24</sup>

Being concerned with internationalisation of territory, this thesis is hence about a concept and its normative underpinnings. It is primarily a legal analysis, yet also a historical study to the extent that the League's Mandate system, through the evolution of fiduciary bonds as means of international governance, has structured the legal instruments available to international society today. The discussion by no means reflects upon the multiplicity of specific historic situations in which internationalisation was utilised, but merely intends to enable us to determine the typological locus of a historical and legal phenomenon. We thus aim to first approximate and then delineate some particular traits of an *Idealtyp* of territorial internationalisation.

There are several different methods available to academic lawyers in order to carry out their pursuits. By looking at the ways through which international authority carries out internationalisation projects, this thesis aims to explain how legal instruments were designed in order to respond to a spatio-temporal need of the international community. I have adopted a broad topological style which interrogates where and how to 'locate' the background assumptions guiding the idea of international fiduciary administration, in legal and philosophical space. At the outset it is appropriate to caution the reader that the analysis presented here is, so to speak, 'undisciplined' in that it transgresses the academic boundaries between traditional international law, sociological jurisprudence and legal history. Accordingly, it strays in and out of the two academic territories of international law and the social sciences.

At least three 'archetypical' forms of propositions in classical international law method will be utilised: The empirical form ('this is the practice of states'); the deductive or analytical form ('given a rule of logical consistency, rule B follows deductively from rule A'); and the teleological form ('this proposition leads to the most desirable result').<sup>25</sup> Clearly, the translation of 'is' statements to 'ought' propositions makes the arguments vulnerable to the dual positivist charges of collapsing the separation between law and sociology and embracing a non-scientific operation that seeks to create a syntactical construct out of norms without

<sup>23</sup> Marcus Cox, *The Making of a Bosnian State: International Law and the Authority of the International Community* (Ph.D. on file with the University of Cambridge, 2001), at 2.

<sup>24</sup> Cf. Nathaniel Berman, 'Legalizing Jerusalem or, Of Law, Fantasy, and Faith', 45 *Catholic University Law Review* 823-835 (1995-96), at 826, as well as Roland Paris, 'Peacebuilding and the Limits of Liberal Internationalism', 22:2 *International Security* 54-89 (1997), at 55.

<sup>25</sup> This categorisation draws on Philip Allott's 'Language, Method and the Nature of International Law', 45 *BYIL* 79-135 (1971), at 80.

regard to their value content.<sup>26</sup> The solution I have adopted here is that whenever the thesis switches into 'policy mode' and prescription, hence linking values and preferences (which are not as such part of the analytical method) with actual events, I explicitly refer to the assumptions and sources from which it derives such 'ought patterns'. Especially in the presentation of 'interests', both held by the international community and by a non-state territorial entity, I have been careful to clarify my observational standpoint and not to let public international law evaporate from the analysis.

In order to identify the relevant *topoi* and the units of research, I will briefly introduce the frameworks utilised to approach the status of a non-state territorial entity under temporary international administration. The overall structure of the thesis is straightforward. In the first two chapters, I survey twentieth-century activity in the area of internationalisation and analyse the methods leading to it, from an *in rem* perspective on the one hand, and a law-of-obligation one on the other. There, my aim is to investigate to what extent the sovereignty frame structures available approaches to the internationalisation of territory. Chapters III and IV are concerned with the status of a non-state territorial entity under international tutelage and the dual functions of the UN-organ administering it. The first four chapters will, in various ways, tackle the issue of how such an entity relates to the international legal plane and, vice versa, how the international legal structure reaches the subjects of its concern directly. I contend that the practice of submitting territories to international administration both challenges and consolidates the international legal *Grundnorm* of sovereign equality. No doubt, temporary international governance of post-conflict territories defies traditional notions of accountability that flow from the identification of the 'sovereign'. Yet, on the other hand, such a practice consolidates traditional notions of sovereign equality by underlining the anomalous and temporary nature of an international administration that works towards the *telos* of resuscitating representation of a territory – and title to it – through its stated vision of enhancing local capacity to an extent that such a dependent territory be reintegrated into its pre-conflict structure (Eastern Slavonia) or stand by itself (East Timor).

The thesis follows a 'cartographical' style in which selection of the object of research appears to oscillate between a structural and phenomenological view. This broad approach is necessary in order to map the 'grids' and coordinates within which the concept of internationalisation can be situated. I have therefore adopted a number of distinct methods. Discussing instances in state practice where *dominium* and *imperium* were 'divorced' from each other, the thesis begins by analysing how the internationalisation of territory can be appreciated from an *in rem* point of view. The forms utilised in Chapter I will thus be both analytical and empirical. Chapter II consists in an inquiry into the nature of an internationalised territory in the twentieth century and seeks to answer some of the conceptual questions arising from the uneasy relationship between the title to territory – legal sovereignty – and indigenous claims to self-determination in moments of international societal expansion. As we will see, jurists encountered analytical obstacles when attempting to 'categorise' fiduciary administrations in accordance with the *in rem* perspective. This static view, advocated *inter alia* by Quincy Wright with regard to the Mandate system,<sup>27</sup> has of course been frequently criticised not only for positing law as a normative repository indepen-

<sup>26</sup> The classical statement is presented in the preface to Kelsen's, *Die Reine Rechtslehre: Einleitung in die rechtswissenschaftliche Problematik* (1<sup>st</sup> ed. 1934, Sciencia Verlag Aalen, 1994).

<sup>27</sup> *Mandates under the League of Nations* (Chicago: University of Chicago Press, 1930).

dent of ethics and sociology,<sup>28</sup> but also for overlooking the auto-regulatory function of international law and its capacity to recreate itself through the occurrence of compliance on the part of the states which deem themselves subject to its normative range. The second chapter's discussion of the change in normative spheres heralded by the League's Mandate system therefore applies a methodology that emphasises the policy implications of jurisprudential developments.

In an article criticising post-conflict governance of territories by the international community for failing to implement minimum standards of accountability, *Korhonen* observes that as such deep interventions become increasingly frequent, the more difficult it would be to "leave the spectator hanging on indeterminate positions towards sovereignty and the identity of power".<sup>29</sup> One of the aims of the second chapter is to turn the argument on its head by demonstrating that the concept of fiduciary administration has, from its inception in the wake of the 'displacement' of sovereignty, instituted a system of reciprocal rights and duties in which international law finds its new 'essential basis' in times of transition. Such fluid arrangements of reciprocal international obligations, developed within the framework of the Mandate and Trusteeship systems, have, of course, influenced the Security Council's current self-authorised practice of territorial administration in anomalous situations. Administration in trust, as a new institution in *McNair's* analysis, has created new international legal instruments which do without sovereignty as the basis for legal representation of territory and the people within it. 'Law' will be presented in Chapter II as an instrument with which international society gradually responded to the changing needs of territories that came to be administered under the 'sacred trust of civilisation'. By using this second contextual frame, devised by what is commonly referred to as the New Haven School,<sup>30</sup> I intend to telescope a process commencing at Versailles and its reconfiguration of political authority at the periphery, via the process of decolonisation and the dismantling of imperial units, to a period after the Cold War in which the ties between the notion of legitimate statehood and the protection of individual human rights emerged strengthened and consolidated. The second chapter is hence designed as a corollary to positivist jurisprudence, which holds that 'existing' rules emanate solely from entities deemed equally 'sovereign'.<sup>31</sup> By applying two competing forms and methods, the first two chapters aim at drawing dialectical counter-images of the notion of 'suspension' of sovereignty.

The third chapter builds on the second – not merely in terms of continuing substantive focus on developments precipitated by the creation of the UN Council for Namibia. Seeking to 'construct' limited legal personality of territories temporarily administered by the international community, my argument utilises a similar method, i.e. the teleological form which advocates that in the achievement of 'community values', international institutions be given the authority

<sup>28</sup> See, for instance, Hans J. Morgenthau, 'Positivism, Functionalism and International Law', 34 *American Journal of International Law* 260-284 (1940), at 261-2.

<sup>29</sup> Outi Korhonen, 'Post' as Justification: International Law and Democracy Building after Iraq', 4:7 *German LJ* 709-723 (2003), at 723.

<sup>30</sup> The principal delineation of the 'New Haven School' approach is presented in Harold D. Lasswell and Myres S. McDougal, *Jurisprudence for a Free Society: Studies in Law, Science and Policy* (New Haven: New Haven Press, 1992). For the contextual, problem-oriented and multi-method approach of such 'configurative' jurisprudence cf. also McDougal *et al.*, 'Theories about International Law: Prologue to a Configurative Jurisprudence', 8 *Virginia JIL* 188-299 (1967-1968).

<sup>31</sup> For the classic statement of states as 'units' of international law see H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), at 191.

to make decisions in support of those values, even if the rules of positivism do not fully support the same result.<sup>32</sup> By crystallising legal concepts in jurisprudential technique, the teleological form frames legal propositions as growing out of a social context. Namibia's decolonisation project is accordingly presented in prescriptive terms which resemble the methodology employed by what has come to be known as Transnational Legal Process. According to this school of thought which opposes autonomous theories of law, policy makers *should* be striving to take account of the changes in normative spheres generated within the transnational socio-political context – in the instance discussed here, by granting UN-administered entities access to the international legal plane. My aim in the third chapter is to re-cast the question of the status of non-state territorial entities as a problem of nascent legal personality which, as I suggest, is constructed at the intersection of international need and municipal desert. In Chapter IV I will follow Transnational Legal Process and incorporate values and 'interests' into the analysis which are held beyond those of the state system and implicitly challenge the positivist doctrine of sources in the achievement of those values. I argue, firstly, that an international administering agent is situated at the exact interface between domestic and international politics and law, and, secondly, that his roles are split into agent and organic functions.

The interrelation between conceptions of trust and legal sovereignty provides the thematic continuity underlying the diversity and detail of the final two chapters. Turning 'inwards' into the politics of an internationalised territory in Chapter V, I introduce the peculiar *problématique* of an open-ended institution-building mandate and apply the theoretical observations made in the preceding analysis. In order to indicate spheres in which those conclusions are of policy significance, I have, where appropriate, included a memo to the Kosovo Prime Minister and an imaginary case study. Accounting for the inherent limitations to comparative studies of international institution-building, Chapter VI then attempts to reach beyond what appears to be an across-the-board criticism of international administrations, and point at systemic constraints that might indeed limit the success of UN territorial governance.

The distinct forms and styles utilised in the final chapter consciously mirror those applied in the first two chapters. Chapter VI begins by conceptualising how claims to the 'legitimate' exercise of power are framed under conditions of internationalisation. It uses a Weberian approach to explore how the pursuit of divergent 'interests' of local and international actors – which I maintain is inherent in an 'open-ended' institution-building mandate of fiduciary nature – impacts on the legitimacy of international political authority. By focusing on the particularities of the normative space within an internationalised territory, the final chapter's second section applies the analytical method of positivism to arrive at conclusions about the *lex lata* and its problematic relation to what jurists refer to as the 'legality' of a certain normative order.

The 'coordinates' of a thus constructed mental map can obviously not be located on a simple temporal axis. I have avoided the language of 'generations' of peacekeeping, as well as the 'old/new' dichotomy that is frequently employed in academic writing with a view to providing a

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<sup>32</sup> Mary Ellen O'Connell, 'New International Legal Process', in *The Methods of International Law* 79-107 (ed. by S.R. Ratner and A.-M. Slaughter, Washington, D.C.:36 ASIL Studies in Transnational Legal Policy, 2004), at 79.

linear narrative of the conceptual evolution of the internationalisation of territory and the increasingly assertive role of the UN's institutional structure. Whereas the extent of the administrative prerogatives held by multilateral bodies in internationalised territories appears unprecedented, it is one of my objectives to de-mystify the alleged novelty of the legal instruments used, in order to supply a somewhat sober analysis of how to integrate such a practice in an evolving system of international law. As *Wilde* has pointed out in a recent essay, there is an inherent flaw in positioning the UN's undertakings in Kosovo and East Timor as the latest pinnacles of a progressive increase of complex intervention, in the culmination of a historical process.<sup>33</sup> We must, however, also avoid drawing an exceptionalist portrait that places international territorial administrations beyond historical experience and applicable legal frameworks. This thesis endeavours, if anything, to point out novelties and exceptionalism when appropriate, while indicating continuity and precedence when apposite. The result of such topological approach is hence not the production of one single mental map, but of layers of a palimpsest through which the conceptual contours of internationalised territories become discernible.

Two final, technical notes are in order. Sometimes history is unkind to researchers. When I left the Balkans after four years of work for the OSCE, I was convinced that I would be able to include the resolution of Kosovo's status in the thesis. This was not the case. An inquiry into the evolving role of UNMIK remains a 'moving target'. As new developments occurred, I incorporated them in the thesis but naturally, I am not in a position to predict the outcome of the final status discussions which are now set for 2006. I therefore regret that some of the conclusions hover between the prescriptive and the speculative. Secondly, I have drawn a number of conclusions from working papers and policy documents that have not been, or will not ever be published. In advanced bureaucratic organisations, the exchange of 'non-papers', 'memos' and 'draft notes' drawn up by informal working groups and circulated among advisers and other mandarins is a complex social ritual by which access to information is bestowed, limited, and denied. This is also the case in the world of UN field missions and their ancillary components. Where I believed that such internal papers actually influenced official policy, I have quoted from their substance. In the bibliography, the reader will see whether the quoted documentary material is drawn from an open source or whether it remains on file with the author.

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<sup>33</sup> Cf. Ralph Wilde, 'Representing International Territorial Administration: A Critique of Some Approaches', 15:1 *EJIL* 71 (2004), 80 *et seq.* The 'Brahimi Report' placed the two 'deep' post-Cold War administration missions – Kosovo and East Timor – in a class of their own as responding to 'extreme' situations (*Report of the Panel on United Nations Peace Operations*, UN Doc. A/55/305, S2000/809, reprinted in 39 *ILM* 1432 (2000), see esp. §§19 and 77). Michael Matheson refers to "the novel...undertakings in Kosovo and East Timor" ('United Nations Governance of Postconflict Societies', 95:1 *AJIL* 76-85 (2001), at 83). For Hansjörg Strohmeyer, the "scope of the challenges and responsibilities deriving from [UNMIK's and UNTAET's] mandates was unprecedented in United Nations peacekeeping operations" ('Collapse and Reconstruction of a Judicial System: the United Nations Missions in Kosovo and East Timor', 95:1 *AJIL* 46-63 (2001), at 46).

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## CHAPTER I

### THE CREATION OF INTERNATIONALISED TERRITORIES

Referring to processes and methods of transferring effective control over territory, this first chapter will mainly focus on territories under international administration as experimental models of 'restricted sovereignty'. One of its major thrusts consists in arguing that the demands of political reality have forced sovereign states for centuries to consent to agreements by which they relinquished a portion of their sovereignty – of the *suprema potestas* – in favour of another sovereign entity.<sup>34</sup> Likewise, as Crawford pointed out, the establishment of autonomous entities under a form of international protection, supervision or guarantees has been a "persistent form of organisation of territories disputed between States on strategic or ethnic or other grounds".<sup>35</sup> We will pursue these two arguments by interrogating an analogy, drawn by *Grotius*, *Pufendorf* and *Selden*, between the Roman private law concept of *dominium* and sovereignty over territory. While the analogy allows us to grasp the key conception of the institution of 'legal sovereignty', it also permits us to examine the various practices which were instrumental in devising exceptions to the application of *dominium* over territory. We will hence begin by adopting an *in rem* perspective in order to capture international legal solutions that were applied to situations in which title to territory had been divorced from *imperium*, or what German constitutional doctrine refers to as *Gebietshoheit*.

The dry re-application of Roman law concepts is, in our submission, a necessary means to disentangle the contested idea of sovereignty from cognate notions of 'supreme will' and 'absolute command' that have marred the term's transformation since *Bodin* and *Hobbes*. Having established the analogy between Roman private law instruments and the notion of territorial sovereignty, we turn to the methodology through which 'regimes' of restricted sovereignty have been created, and eventually to the establishment of entities temporarily administered by the United Nations. We provide a first normative frame within which the transfer of *imperium*, from a sovereign power to a protecting entity with the former retaining the sovereign claim as a bare title, can be located. This *in rem* perspective will be later utilised to capture some aspects of the phenomenon of an international administration which is caught between honouring the 'suspended' title of the sovereign and the fiduciary obligations it is mandated to pursue with respect to the territory in which it exercises temporary *imperium*.

We begin by addressing two interrelated issues that have been debated in recent literature: (i), the transfer of effective control, through 'horizontal' means (treaty), by a state to another entity that leaves the old sovereign with a *nudum jus* he can still dispose of, as developed by doctrine and jurisprudence, and as practiced by states; (ii), we focus on the capacity of the United Nations to administer territory, and to 'vertically impose' a transfer of effective control, based on Chapter VII of the UN Charter. The mandate and extent of the authority of UN Missions in internationalised territories such as Kosovo and their status in international law, will then be interpreted as the synthesis between the horizontal tradition of transferring effective control and the application of vertical instruments in public international law.

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<sup>34</sup> Cf. Patrick Daillier and Alain Pellet, *Droit International Public* (6<sup>th</sup> ed., Paris 1999), at §313.

<sup>35</sup> James Crawford, *The Creation of States in International Law* (Oxford: OUP, 1979), at 160.

## 1.1 HORIZONTAL TRANSFER OF EFFECTIVE CONTROL AND THE BARE TITLE TO TERRITORY

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This section aims to bring into sharper focus the concept of residual sovereignty through the prism of the horizontal dynamics that governed the transfer of effective control, as distinct from title to territory, and applies it to the model of international territorial administration.<sup>36</sup> The concept of 'suspended' sovereignty is not at all new to legal and political discourse in international relations.<sup>37</sup> It is increasingly employed when investigating the properties of territories under international administration which were conceived on the basis of a distinct multilateral settlement.<sup>38</sup> An analysis of instances involving a disjunction of notions of sovereignty and territorial control includes a reappraisal of the relationship between *imperium* and *dominium*; their duality adds a conceptual mediation to the definition of sovereignty.<sup>39</sup>

### 1.1.1 DOCTRINE AND JURISPRUDENCE

The acceptance of territorial sovereignty as a 'rule of recognition' at the settlement of Westphalia meant that mutually exclusive areas were carved out for the exercise of supreme authority with the sovereigns recognising only this form of political organisation as legitimate. The adoption of Roman private law concepts represented a "convenient way of squaring their claims to supremacy with the mutual recognition of equality".<sup>40</sup> *Dominium* in this sense represented the "ultimate legal title beyond and above which there was no other"<sup>41</sup> and involved both an obligation on the part of others to abstain from all interference, and the right of its holder to act on the territory, a faculty of absolute disposition. 'Titular sovereignty' in international law has thus been used to describe the right of ownership which a state may have over any particular portion of territory,<sup>42</sup> with the territorial sovereign exercising effective control similar to an owner of an object. Similar to continental legal conceptions, sovereignty would also be conceptualised as an *analogon* to *dominium* in common law systems. As O'Connell explains, the common law theory of title "still has its roots in feudal law with the

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<sup>36</sup> Parts of this section appeared in my 'UN *Imperium*: Horizontal and Vertical Transfer of Effective Control and the Concept of Residual Sovereignty in 'Internationalised' Territories', 7 *Austrian RIEL* 3-52 (2002).

<sup>37</sup> A rough typology of state practice regarding non-sovereign entities with limited (or restricted) international personality is provided by Méir Ydit, *Internationalised Territories. From the 'Free City of Cracow' to the 'Free City of Berlin'. A Study in the Historical Development of a Modern Notion in International Law and International Relations (1815 – 1960)* (Leiden: A.W. Sythoff, 1961), at 19-20. See also J.H.W. Verzijl, *International Law in Historical Perspective*, vol. II (Leiden, 1969), Chapter VI, and vol. III (1970), Chapter IV.

<sup>38</sup> Cf., e.g., Alexandros Yannis, 'The Concept of Suspended Sovereignty in International Law', 13:5 *EJIL* 1037-1052 (2002), at 1043 *et seq.*

<sup>39</sup> For a brief account of the 'Viennese school's' contribution to an understanding of the object theory of the state cf. Erik Suy, 'Réflexions sur la distinction entre la souveraineté et la compétence territoriale', in *Internationale Festschrift für Alfred Verdross* (Munich/Salzburg: Wilhelm Fink, 1971), at 493 *et seq.*

<sup>40</sup> Friedrich Kratochwil, 'Sovereignty as *Dominium*. Is There a Right of Humanitarian Intervention?', in *Beyond Westphalia? State Sovereignty and International Intervention* (ed. by G. M. Lyons and M. Mastanduno, Baltimore: JHU Press, 1995), 21-42, at 25.

<sup>41</sup> W.W. Buckland, *Textbook of Roman Law* (3<sup>rd</sup> ed. by Stein, 1963), at 188.

<sup>42</sup> Elihu Lauterpacht, 'The International Personality of the United Nations. Capacity to Administer Territory', 5 *ICLQ* 409-413 (1956), at 410. Similar: Malcolm N. Shaw, 'Territory in International Law', 13 *NYIL* 61 (1982), at 74.



Crown having the ultimate reversion and proprietary rights being explained in terms of vassalage. Accordingly, sovereignty and property are indistinguishable conceptions to the Anglo-American lawyer."<sup>43</sup>

Whereas late medieval doctrine had sought to derive *imperium* from *dominium* according to the principle of territorial sovereignty, the 'subject theory' rejected such derivation and only acknowledged a connection: the *imperium* was not necessarily territorial.<sup>44</sup> Yet prevailing scholarly opinion continued to view jurisdiction as an essentially territorial concept and referred to the concept of *imperium* as general state jurisdiction derived from Roman constitutional law while employing the Roman law of ownership and its conception of *dominium* as to refer to rights over things, in particular territory or land.<sup>45</sup> The possession of title conceived along the lines of Roman property rights hence implied the right of title holder to exercise supreme authority as long as he remained within his territorially limited domain. The boundaries of the right to territorial control were no longer determined by 'right use' but became dependent on the mutual acceptance that acts of the sovereign in his public capacity were valid *prima facie* and not reviewable by others. The entitlement to exclusive possession "could no longer be lost by reason of the objectionable exercise of proprietary rights, except those based on the institutionally explicit procedures providing for the acquisition or loss of title".<sup>46</sup>

The exercise of *imperium*, on the other hand, involved the assertion or exercise of legal authority or competence, actual or purported, over persons who owed some form of allegiance to that authority or who had been brought under this authority's control. It has also been suggested that the term 'jurisdiction' generally entailed some form of structured relationship normally existing over time.<sup>47</sup> Building on the foundations of 'object theory', the 'competence theory' rejected one of its key assumptions: it comprehended territory not as a geographical conception but as "the sphere of validity of a juridical order based in space".<sup>48</sup> Its followers comprehended the state as ruling *within* territory, not over it, and the 'people' as

<sup>43</sup> *International Law* (vol. I, London: Stevens & Sons, 1970 [1965]), at 403-404. For a review of the analogy between the conception of the individual with an 'automatic' (natural) right of property and the state with sovereignty over its territory through its simple existence as state, see Anthony Cartwright, *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs* (Manchester: Manchester UP, 1986), at 44-46 and 55-60.

<sup>44</sup> Compare, for instance, Carl Friedrich von Gerber's interpretation of territory as the 'body' of the state 'person', in *Grundzüge des deutschen Staatsrechts* (3rd ed., Leipzig, 1880), at 67.

<sup>45</sup> Cf. Ian Brownlie, *Principles of Public International Law* (4<sup>th</sup> ed., Oxford: Clarendon Press, 1990), at 108-9; Hersch Lauterpacht, *International Law: Collected Papers* (ed. by E. Lauterpacht, Cambridge: CUP, 1970), 367-70; Verzijl, *International Law*, *supra* note 37, vol. III, Chapter 1, at 9; Alfred Verdross, *Völkerrecht* (5th ed., Vienna: Springer Verlag, 1964), at 267, and Donati who, in the tradition of Roman ownership law, argued "che il diritto dello Stato sul territorio costituisce un diritto di dominio in senso stretto" (8 *Rivista di diritto internazionale* (1914), at 471). For the reception of Roman property regimes into modern *jus gentium* cf. also Joshua Castellio and Steve Allen, *Title to Territory in International Law. A Temporal Analysis* (Aldershot: Ashgate, 2003), at 42-55.

<sup>46</sup> Kratochwil, 'Dominium', *supra* note 40, at 26.

<sup>47</sup> This position was recently reinforced by the *Banković* case in which the European Court of Human Rights (ECHR) concluded that extraterritorial jurisdiction can only be recognized in cases where a state effectively controls the relevant territory and its inhabitants, exercising at least some of the public powers normally exercised by that government (*Banković and Others v. Belgium and 16 Other Contracting States*, [2001], ECHR, No. 52207/99, 12 December 2001 (Decision (Admissibility)), at §§59-73). The Decision will be briefly discussed in Chapter VI.2.3, *infra* note 884.

<sup>48</sup> Josef L. Kunz, "The Vienna School" and International Law', 2 *NYU Law Quarterly* 370-421 (1934), at 392.

the personal sphere of validity of a juridical order.<sup>49</sup>

Neither the Permanent Court (PCIJ) nor the International Court of Justice (ICJ) have followed the propositions of the competence theory, namely, to let the law of territory vanish into the law of jurisdiction.<sup>50</sup> Instead, they continued to interpret the notion of sovereignty over a certain part of the globe as *dominium* in analogy to Roman private law. They thereby followed a conception of legal sovereignty that implied that *imperium* and *dominium* are connected, precisely because both population and territory are elements of the state, each element being dependent on the other.<sup>51</sup> As Portugal's judge *ad hoc* stated in the *Right of Passage* case, "[s]overeignty over territory implies the capacity to exercise public authority in that territory. It implies the right and the obligation to maintain public order there, if necessary *manu militari*".<sup>52</sup> A government exercises its sovereign title, thus connecting the population with the respective territory.

Although the Court acknowledged that *imperium* is usually found in the same hands as *dominium*, or legal sovereignty, it continued to disconnect the two concepts. This doctrinal disconnection has been adopted from Roman commentators who recognised that the scope of territorial jurisdiction could be altered by consent while leaving the title over territory untouched. Ulpian's separation between *proprietas* and *possessio*<sup>53</sup> appears to reverberate through the PCIJ judgment in the *S.S. Lotus* case: "All that can be required of a state is that it should not overstep the limits which international law places upon its jurisdiction. Without these limits its title to exercise jurisdiction rests in its sovereignty".<sup>54</sup> The disjunction between sovereign claims and effective control has to some extent been dealt with in a case in which the Security Council requested an Advisory Opinion from the ICJ on the legal consequences of South Africa's continued presence in Namibia.<sup>55</sup> There, the ICJ reaffirmed the distinction between physical control over a territory and the notion of sovereignty or legitimacy of title:

The fact that South Africa no longer has any title to administer the Territory does not release it

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<sup>49</sup> Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (New York: Longmans, 1927), at 93. On the essential identity between jurisdiction, control and sovereignty, see also his 'Sovereignty over Submarine Areas', 27 *BYIL* 376-433 (1950), at 389: "For exclusive jurisdiction and control is sovereignty. This is so necessarily, seeing that State territory is the space within which the State exercises its supreme authority".

<sup>50</sup> Cf. Carty, *Decay*, *supra* note 43, at 46.

<sup>51</sup> Building on the the *Memel Territory* case and the *Treatment of Polish Nationals* opinion (*infra*, note 406), the PCIJ assumed there could not be more than one sovereign in respect of given territory. In separating competing state powers, "the actual exercise of sovereign rights" would be the yardstick to measure the strength of the respective claims to "territorial sovereignty" (*Legal Status of Eastern Greenland* case (*Denmark v. Norway*, PCIJ (Ser. A/B), No. 53 (1933), at 46)).

<sup>52</sup> Judge Fernandes, diss. op. in the *Right of Passage over Indian Territory* case (*Portugal v. India*), ICJ Reports [1960] 6, at 124.

<sup>53</sup> Cf. J.A.C. Thomas, *Textbook of Roman Law* (1976), at 138. Cf. also W.W. Buckland and Arnold McNair, *Roman Law and Common Law. A Comparison in Outline* (2<sup>nd</sup> ed. by F.H. Lawson, 1965), at 62.

<sup>54</sup> *France v. Turkey*, PCIJ (Ser. A), No. 10 (1927), at 19. Kelsen also implicitly subscribed to the distinction. Though referring to the functional competencies of state organs, he maintained that "[u]nder International Law, only the state within the boundaries of which a territory lies is entitled to dispose of this territory, which means that...only organs of the national legal order have the power to enter into legal transactions referring to the territory" (*Principles of International Law* (New York: Rinehart&Co, 1952), at 217).

<sup>55</sup> S/RES/284, 29 July 1970, UN Doc. S/INF/25, reproduced in 9 *ILM* 1090 (1970), at 4, §1.

from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States.<sup>56</sup>

The nexus between legal title and the exercise of effective control, as well as the rights and obligations flowing from that exercise, was also the subject of a fierce legal debate that surrounded the *East Timor* case.<sup>57</sup> Although the *Monetary Gold* principle<sup>58</sup> was found to operate as a jurisdictional barrier to Portugal's claim that it alone, in its capacity as administrative power, had the capacity to enter into a treaty on behalf of East Timor, the Court nevertheless emphasised the continued legitimate authority of Portugal to administer the territory, despite the full and effective territorial control exercised by Indonesia following its unlawful military occupation in December 1975. The case raises very interesting questions, not so much regarding the divorce between sovereign title and effective control (since Portugal did not have any sovereign rights, save in its capacity as custodian of the rights of East Timorese people), but concerning the disjunction of a claim to jurisdiction and effective control, two terms that are often interchangeably used. Effectively, Australia submitted that Portugal lacked the capacity to implement any treaty it may have signed relating to East Timor. Absent this capacity, Australia argued, Portugal would also lack the ability to enter into any meaningful treaty regarding the territory, or to complain that a treaty has been entered into by another state having effective control. Portugal, on the other hand, replied that although it has physically left the territory and no longer controls it, it was nonetheless the administering power, charged with the responsibility arising from Chapter XI of the UN Charter.

A thorough analysis of the issue, unfortunately not undertaken by the Court, would entail an enquiry into the question whether an administrative power's loss of *imperium* deprives it of the status and functions of an administrative authority and whether "the protective and reporting structure, so carefully fashioned by the United Nations Charter, can be thus brushed aside."<sup>59</sup> For the purposes of this chapter, it will prove to be useful to maintain such clear distinction between title to territory and effective control – a striking characteristic of Roman law –, and to correlate the two concepts that can, in some cases, undergo shifts in opposite directions.<sup>60</sup> While the transposition of Roman law concepts into international normative space has been criticised, in particular to the extent that it represented territory as something extraneous to the state itself, it nevertheless supplies a set of coherent and useful methodological tools with which disjunction phenomena may be contemplated.

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<sup>56</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports [1971] 16, at §118. For an extensive discussion of the Opinion see Chapter II.2.1 (i).

<sup>57</sup> *Portugal v. Australia*, ICJ Reports [1995] 90, at 99.

<sup>58</sup> In its judgment concerning *Monetary Gold Removed from Rome in 1943*, the Court declined to rule on the lawfulness of the conduct of a third state in the absence of this state's consent (*Italy v. France, United Kingdom and USA*, ICJ Reports [1954] 19, at 32). For a discussion cf. C. Antonopoulos, 'Effectiveness v. the Rule of Law Following the East Timor Case', 27 *NYIL* 75-111 (1996), at 82 *et seq.* and Peter Hilpold, 'Das Selbstbestimmungsrecht der Völker vor dem IGH – der Osttimor-Fall', 53 *ÖZöRV* 263-291 (1998), at 275-278.

<sup>59</sup> Diss. op. Judge Weeramantry in the *East Timor* case, *supra* note 57, part B(ii).

<sup>60</sup> Cf. Bernard Gilson, *The Conceptual System of Sovereign Equality* (Leuven: Peeters, 1984), at 164.

### 1.1.2 THE DYNAMICS OF STATE PRACTICE

The conception that territory might be essential to the exercise of state power, yet without constituting one of its elements according to the object theory, has been reinforced by state practice. This becomes particularly salient when reviewing cases in which the aggregate of public competencies respective to the territory and its inhabitants was transferred while the bare title to territory was retained. From the homogenous nature of the actors involved in such transfer, i.e. states, the dynamics shifted to include, with the creation of the League of Nation and later the United Nations – multilateral bodies operating alongside single actors that would similarly engage in the horizontal transfer of effective control, using the same instruments.

A state, the grantor, can clearly cede sovereignty over a certain land, on a horizontal basis, and, to that extent, dispose of its title, without territorial control necessarily falling into the hands of the grantee.<sup>61</sup> As a corollary, territorial control – understood as positive jurisdiction over people – can be transferred to the exclusive benefit of another entity, without the latter acquiring sovereign title. Though the extent of powers delegated to the 'protecting entity' has varied over the course of the 20<sup>th</sup> century, formal sovereignty remained unaffected, albeit reduced and shrunken to a *nudum jus*. In other words, a "scintilla of sovereignty – a reversionary sovereignty"<sup>62</sup> – subsisted. The following discussion demonstrates that this reduced claim to sovereign title cannot be regarded as a legal fiction.<sup>63</sup> The *nudum jus* may acquire normative content with the re-transfer of effective control and complete jurisdiction from the protecting entity. The concrete entitlement, in its reduced form, remains tangible because the sovereign can still dispose of the territory effectively controlled by another administrative entity in a legal transaction with another state. The following cases illustrate this proposition.

#### (I) THE LEASES OF THE PANAMA CANAL AND GUANTÁNAMO BAY (BOTH 1903)

Examples in which administration and effective control are divorced from sovereign title can be found in certain minor territorial rights such as leases or servitudes in which titular sovereignty has been resuscitated after the termination of the lease.<sup>64</sup> Amongst the most

<sup>61</sup> Alfred Verdross, Bruno Simma, and Rudolf Geiger ('Territoriale Souveränität und Gebietshoheit', 31 *ÖZöRV* 223-245 (1980), at 226) discuss the cases of Austria ceding sovereignty over Lombardy (Treaty of Zurich, 10 November 1859) and Venice (Treaty of Vienna, 24 August 1866) to France without the latter assuming effective control which, instead, was acquired by Sardinia.

<sup>62</sup> Lester H. Woolsey, 'The Sovereignty of the Panama Canal Zone', 20 *AJIL* 117-124 (1926), at 121. The concept of reversion should be distinguished from that of residual sovereignty, the principal point of difference consisting in the fact that reversion involves a change of sovereignty, whilst in the case of residual sovereignty, the territorial sovereign has not lost status as such (Brownlie, *Principles*, 4<sup>th</sup> ed., *supra* note 45, at 112-3). We thus prefer to use the term 'residual', rather than 'reversionary', sovereignty. Cf. also examples of titular, residual and distributed sovereignty in O'Connell, *International Law*, *supra* note 43, at 325-327.

<sup>63</sup> As advocated by Julie Ringelheim, *The Legal Status of Kosovo*, in *Kosovo 1999-2000: The Intractable Peace* (EUI Working Group Report, 2000), section 2.2., as well as in her 'International Reactions to the Kosovo Crisis', 32 *Revue belge de droit international* 475 (1999-2), at 540. See the discussion in Chapter V.1.1 (ii), *infra* p. 155.

<sup>64</sup> See, generally, Christian Rumpf, 'Territory, Lease', in 4 *EPIL* (ed. by Rudolf Bernhardt, Amsterdam: Elsevier, 2000), 842-844. In 1898, China leased four territories to the German Empire to Russia, France, and to England, explicitly without transferring territorial sovereignty. Cf. Rudolf Kirchschläger, 'Pacht', in *Wörterbuch des Völkerrechts* (vol. II, ed. by H.-J. Schlochauer, 1961), at 707-8. By the treaty of Peace of Portsmouth (1905), Russia, in turn, sub-ceded the lease of Port

eminent<sup>65</sup> is the Hay/Bunau-Varilla Treaty of 18 November 1903 between the USA and the Republic of Panama. In Article III of the Treaty, Panama granted to the US

all the rights, powers and authority regarding the zone ... which the United States would possess and exercise if it were the sovereign of the territory ... to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, powers, or authority.<sup>66</sup>

The treaty thus preserved a titular sovereignty over the Canal Zone that was automatically resuscitated when the initial 1903 Treaty was terminated by a new Panama Canal Treaty of 1977.<sup>67</sup> As a corollary, the US had acquired temporary jurisdiction that amounted to physical control over territory, but certainly not to sovereign powers.<sup>68</sup> Distinguishing not only between territorial sovereignty and territorial supremacy (*Gebietshoheit*) but also between the right to exercise territorial control, derived from territorial sovereignty, and its actual exercise (which can be legitimate or illegitimate), Verdroß suggested that the US exercised its, rather than Panama's, territorial control over the canal: The United States

herrschen in dieser Zone allerdings auf einem fremden Gebiete, sie üben aber dort einzig und alleine ihre durch ihre eigenstaatliche Rechtsordnung geregelte Gebietshoheit aus, wodurch natürlich die Gebietshoheit des territorialen Souveräns beschränkt wird. Hingegen bleibt die territoriale Souveränität Panamas über dieses Gebiet – trotz der dort begründeten Gebiets-hoheit eines fremden Staates – weiter bestehen... Er kann [das Gebiet] derelinquirieren, an einen anderen Staat zedieren oder mit anderen Gebieten zu einem neuen Staate verschmelzen, ohne die Zustimmung der VSt zu bedürfen.<sup>69</sup>

The Agreement of 16/23 February 1903 in which the United States and Cuba agreed to 'cede in lease' lands in Cuba for the purpose of coalmining and the establishment of naval

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Arthur and Talienwan to Japan (Lindley, *Acquisition*, *supra* note 12, at 239). Similarly, Japan, based on the Peace Treaty of 8 September 1951, ceded the right to exercise full legislative, judicial, and administrative control over Okinawa to the U.S., whereas residual sovereignty resided with Japan. In 1951 the US Secretary of State Dulles referred to the "residual sovereignty of Japan over the islands" that enabled her to place them under the trusteeship of the United Nations, "with the United States as the administering authority" (quoted by Brownlie, *Principles*, 4<sup>th</sup> ed., *supra* note 45, at 112). For exceptional restrictions to the territorial supremacy of a state cf. Oppenheim, *International Law*, vol.1 (8<sup>th</sup> edition ed. by Lauterpacht, London: Longmans, 1955), at 188-197 and 535-543, as well as Ferenc A. Váli, *Servitudes in International Law. A Study of Rights in Foreign Territories* (2<sup>nd</sup> ed., London: Stevens, 1958), at 277.

<sup>65</sup> The status of the New Territories and Hong Kong was of special nature and will not be discussed under here. See, however, Yash Ghai, *Hong Kong's New Constitutional Order – The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong: Hong Kong UP, 1997).

<sup>66</sup> Quoted by Woolsey, 'Panama Canal', *supra* note 62, at 118-119 (my italics).

<sup>67</sup> AJIL 72 (1978), at 516. This superseded the treaties of 1901, 1903, 1936 and 1955 governing the Canal. See Malcolm N. Shaw, *International Law* (Cambridge: CUP, 1997), 367 at note 203, and Verdroß et al., 'Gebietshoheit', *supra* note 61, at 232.

<sup>68</sup> US Secretary of State Vance, addressing the House Committee on International Relations, said: "In 1903, we acquired certain rights, similar to those exercised by a sovereign, but nonetheless rights, not sovereignty" (quoted by Verdroß et al., 'Gebietshoheit', *supra* note 61, at 234). For case law (both the US Supreme Court and the Supreme Court of the Panama Canal Zone) cf. O'Connell, *International Law*, vol. I, *supra* note 43, at 326-327.

<sup>69</sup> Verdroß, *Völkerrecht*, 5th ed., *supra* note 45, at 268. In the successive Panama Canal Treaty of 1977, Panama was demonstratively referred to as "territorial sovereign" that "grants to the [USA] the rights to manage, operate and maintain the Panama Canal..." (Article I and III of the Panama Canal Treaty). For Panama's residual sovereignty cf. also Brownlie, *Principles*, 4<sup>th</sup> ed., *supra* note 45, at 111-112.

bases provides another illustration of an intention to shift the right to exercise territorial jurisdiction while preserving the locus of titular sovereignty. Article III of the Agreement provided that

[w]hile on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation...the United States shall exercise complete jurisdiction and control over and within said areas.<sup>70</sup>

(ii) BOSNIA AND HERZEGOVINA (1878) AND THE SAAR TERRITORY (1920)

In the aftermath of the Congress of Berlin in 1878, the provinces of Bosnia and Herzegovina were occupied and administered by Austria and Hungary,<sup>71</sup> with the Sublime Porte retaining legal title to the exercise of effective control. In that case, the Sublime Porte entered into a valid treaty relationship with Austria, affording to the latter certain extensive functions, both internally and externally. In a declaration made at the Conference at which the Treaty was adopted, the representatives of Austria-Hungary expressly accepted that the rights of sovereignty of the Sublime Porte over the provinces of Bosnia-Herzegovina would not be affected by the fact of occupation.<sup>72</sup>

The concept of suspended sovereignty has similarly been invoked when far-reaching authority in the management of a territory's domestic affairs had been conferred upon different protecting entities – multilateral agencies – using identical legal instruments and procedures as those concerning single entity recipients. Particularly in the inter-war era, nationalist passion aligned itself with the newly autonomous international law to create a sophisticated system of minority regimes under the auspices of the League of Nations.<sup>73</sup> The administration of the Saar Territory between 1920 and 1935 is such an example. Based on the Versailles Treaty,<sup>74</sup> an International Governing Commission representing the League of Nations was entrusted with the exercise of executive and legislative powers, without being

<sup>70</sup> Quoted by Joseph Lazar, 'International Legal Status of Guantánamo Bay', 62 *AJIL* 730-740 (1968), at 733. The Agreement of February 1903 was implemented by the 'Lease to the United States by Cuba of Land and Water for Naval and Coaling Stations in Guantánamo and Bahia Honda' Agreement (Washington, 2 July 1903). See also Lazar, 'Cession in Lease' of the Guantánamo Bay Naval Station and Cuba's "Ultimate Sovereignty", 63 *AJIL* 116-118 (1969). Whether sovereignty or territorial jurisdiction would form the basis of an inquiry into habeas jurisdiction and the status of detainees held at Guantánamo Naval Base has recently attracted increased attention. Cf., i.e., the discussion in United States Court for Appeals, Ninth Circuit, *Gherebi v. Bush and Rumsfeld*, 43 *ILM* 381 (2004), at 389 *et seq.*

<sup>71</sup> Art. XXV of the Treaty of Berlin, 13 July 1878. Cf. Verzijl, *International Law*, vol. III, *supra* note 37, at 408; Verdross et al., 'Gebietshoheit', *supra* note 61, at 227. Contrary to the occupation and administration of Cyprus by England based on the Treaty of June 1878 between the Sublime Porte and England, the transfer of effective control over Bosnia-Herzegovina to the 'protecting state' Austria-Hungary was not limited in time.

<sup>72</sup> See Bernadotte E. Schmitt, *The Annexation of Bosnia 1908-1909* (1937), quoted in C.A. Whomersley, 'The International Legal Status of Gdansk, Klaipeda and the Former East Prussia', 42 *ICLQ* 919-927 (1993), at 925.

<sup>73</sup> Cf. Chapter II.1.2, *infra* p. 59.

<sup>74</sup> Treaty of Peace between the Principal Allied and Associated Powers and Germany of 28 June 1919 (Treaty of Versailles), 225 *Consolidated TS* (1919), at 189, Part III, Section IV, Annex, Art. 16. See generally on the subject Frank M. Russel, *The International Government of the Saar* (Berkeley, Cal.: University of California Press, 1926). A useful synopsis is provided by Fritz Münch, 'Saar Territory', in 4 *EPIL* 271-273 (2000).

bound by local legislative bodies. The powers that would later be acquired by the UNMIK Special Representative of the UN Secretary-General (SRSG) under Resolution 1244 and UNMIK Regulation 1999/1<sup>75</sup> are reminiscent of the authority given to the Saar Commission. The Treaty of Versailles granted the Commission "all the powers of government [hitherto belonging to Germany], including the appointment and dismissal of officials, and the creation of such administrative and representative bodies as it may deem necessary."<sup>76</sup> Following the suspension of German authority pending the referendum on the status of the 'Territory of the Saar Basin',<sup>77</sup> all governmental powers were ceded to the League under the Treaty of Versailles. The Saar Commission occasionally consulted with Saarland leaders and frequently reported to the Council of the League on its activities.

It may be suggested that the Saarland was not so much internationalised as, in fact, governed by France, through the League of Nations regime and in co-operation with it. The Commission, however, exercised effective control over the territory. This temporary trusteeship of the League was exercised while Germany remained the titular sovereign over the territory. As Corbett wrote, Germany retained, at the minimum, the "*nuda proprietas* of sovereignty, as she retains the *nuda proprietas* of all her domanial property, except the mines, in the Saar".<sup>78</sup> The approach chosen in the Saarland case involved a separation of formal title (Germany), material interest (accorded in large part to France) and governing power (vested in the Commission)<sup>79</sup> – an international legal solution involving the temporal desegregation of public authority which would be re-applied in the case of Kosovo in 1999.

### (III) CONTRASTING THE *NUDUM JUS* WITH STATE SERVITUDES

Even if these residual territorial rights hardly appear operative, the legal framework, however remote its contingencies, is not meaningless. As we will see later when discussing the legal status of internationalised territories whose 'final status' in public international law has been deliberately left open, improbable contingencies may become realities, and full sovereignty may revert back to the holder of the *nudum jus*. Before looking at the current scenario of Kosovo, however, the next section places the residual title to territory within another explanatory framework analogised from the Roman law of ownership – state servitudes.<sup>80</sup> In the

<sup>75</sup> Cf. Chapter V.1.1, *infra*, p. 150.

<sup>76</sup> Treaty of Peace, *supra*, Art. 19.

<sup>77</sup> The mandate of the League ended in 1935 when the population of the Saar Territory voted in a plebiscite on 13 January 1935 in favour of immediate reunification with Germany.

<sup>78</sup> Percy E. Corbett, 'What is the League of Nations?', 5 *BYIL* (1924), at 127. Similarly, Ydit claimed that "what really remained for Germany was only the *nudum jus* to the territory itself" (*Internationalised Territories*, *supra* note 37, at 45). Hurst Hannum remarks that "German courts considered the Saar to be part of the Reich for various purposes. Saar residents also retained German nationality. However, the Saar was a wholly autonomous regime..., and all governmental ties with Germany were severed during this time" (*Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1996), at 391).

<sup>79</sup> Adapted from Nathaniel Berman's "But the Alternative Is Despair": European Nationalism and the Modernist Renewal of International Law', 106 *Harvard LR* 1792-1903 (1992-1993), at 1879.

<sup>80</sup> Cautiousness in establishing analogies between the private law systems and state servitudes is certainly appropriate. For Lauterpacht, no attempt to apply conceptions taken from private laws to inter-state relations "has caused more confusion or has brought the recourse to analogy into more disrepute than the efforts made to introduce the conception of servitudes into international public law" (*Private Law Sources*, *supra* note 49, at 119). Whether the concept of servitude has a place in international law is still contested. According to Ragazzi, no generally accepted definition of the

context of the Saarland administration, it has been argued that the exercise of German authority was temporarily limited to a period of 15 years for the benefit of the League of Nations which exercised effective control through its agent, the Saar Commission.<sup>81</sup> Accordingly, 'internationalisation' of a territory has been understood as

die vertragliche Verpflichtung eines Staates, auf die Verwaltung eines Gebietsteils, der weiterhin unter seiner Souveränität bleibt, zugunsten gewisser regelmäßiger Verkehrsinteressen anderer Staaten oder aller Staaten zu verzichten.<sup>82</sup>

This conceptual reinterpretation of an international territorial administration along the lines of rights exercised in foreign territory corresponding to a *non-faciendo* or *in patiendo* on the part of the burdened state holds particular appeal since it allows us to distinguish it from the League of Nations regime governing the administration of Mandate territories in which the sovereignty of colonies and territories have "ceased to be under the sovereignty of the States which formerly governed them".<sup>83</sup> Also, in the discussion before the Council of the League in the matter of the Polish rights upon the Westerplatte, these rights were styled by the President of the Danzig Senate as "servitude".<sup>84</sup>

As we will see later when discussing the status of Kosovo in international law, the institution of state servitude could assist in further defining the legal properties of an international territorial administrations and the international legal framework within which it is required to discharge its functions. One could liken Kosovo's status in international law to a general servitude exercised by the United Nations on behalf and in favour of a limited legal subject of international law<sup>85</sup> which cannot exercise it itself. As *Daillier* and *Pellet* point out, the powers which accompany the creation of a servitude could by analogy be said to attach to other types of institutions, or, in their terminology, to 'integrated organisations'.<sup>86</sup>

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concept and scope of state servitudes has emerged (*The Concept of International Obligations Erga Omnes* (Clarendon Press, Oxford, 1997), at 21-22, with annotated bibliography).

<sup>81</sup> Art. 49 of the Treaty of Versailles determined that "Germany renounces in favour of the League in the capacity of trustee the government of the territory defined above. At the end of fifteen years..., the inhabitants of the said territory shall be called to indicate the sovereignty under which they desire to be placed". Julius Hatschek interpreted this provision convincingly, arguing that „Der Völkerbund als Rechtssubjekt ad hoc erhält eine Staatsservitut, d.h. er schränkt die deutsche Staatshoheit für die Dauer von 15 Jahren dahin ein, daß er die Regierung übernimmt" (*Völkerrecht als System rechtlich bedeutsamer Staatsakte* (Leipzig/Erlangen, 1923), at 161). Cf. also Váli, *Servitudes*, *supra* note 64, at 281, including annotated literature. Sceptical as to the creation of a state servitude in the case of the Saar: Lauterpacht, *Private Law Sources*, *supra* note 49, at 124.

<sup>82</sup> Raimund Beck, *Die Internationalisierung von Territorien* (Stuttgart: Kohlhammer, 1962), at 71.

<sup>83</sup> League of Nations Covenant, Art. 22 §1 (my italics). See Chapter II.1.2 (ii), *infra* p. 56. For a discussion of some the Versailles Treaty's provisions establishing rights with a 'real' character see Arnold McNair, 'So-Called State Servitudes', 6 *BYIL* 111-127 (1925).

<sup>84</sup> Quoted by Váli, *Servitudes*, *supra* note 64, at 61, note 5. The appreciation of the similarity between processes of internationalisation and international servitudes however precedes the creation League of Nations. See David J. Bederman, 'The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Sparte', 36 *Virginia JIL* 275-377 (1995-1996), at 319 *et seq.* (concluding the 1865 Convention Concerning the Administration and Upholding of the Lighthouse at Cape sparte delegated the operation of the lighthouse to an international competence, not the Maroccan territory upon which the lighthouse was situated).

<sup>85</sup> For the argument that seeks to construct limited international legal personality for internationalised territories, see Chapter III.2, *infra*, p. 105.

<sup>86</sup> Daillier/Pellet, *Droit International Public*, *supra* note 34, no. 315.



A sub-category of personal servitudes is that of public servitudes, which are burdens upon a piece of land for the benefit of the general public, a group of individuals or their representative body.<sup>87</sup> Hence, even if there was no contractual basis for the transfer of the title to exercise effective control, the general servitude in favour of a limited subject of international law – a territory under UN administration – could have been vertically imposed by the UN Security Council (SC) on the basis of Chapter VII of the Charter. In applying *ordre public* considerations in municipal law, according to which the right of passage can be imposed on the owner of a land (or the right of the public to navigate a river, the bed of which belongs to a private person), the internationalisation of territory by the SC's reliance on Chapter VII could be viewed as the imposition of a *temporary servitude juris gentium necessariae*. The *non-faciendo* of the burdened state (Serbia and Montenegro) would then correspond to the right of the UN to temporarily exercise *imperium* on the territory. International servitudes, in this re-conceptualisation, can be understood as temporal limitations upon the sovereign exercise of authority of one entity, rather than 'real entitlements' held by the administering organ, and are conceived as operating independently from territorial sovereignty.<sup>88</sup>

While the merits of such a systematic transposition of private/public law figures shall not be discussed here in detail, the conceptual reinterpretation of an international territorial administration holds appeal in that it might enable us to draw analogies between the legal properties accompanying the establishment of a state servitude. The careful application of the *analogon* of servitude could assist us in our argument that the imposition of an 'objective legal regime' created obligations with *erga omnes* character which can only be fulfilled or breached vis-à-vis *all* states.

#### 1.1.4 MIXED METHODOLOGY: CHAPTER VII AND THE INCORPORATION OF A HORIZONTAL AGREEMENT

The case of Eastern Slavonia is illustrative of the 'vertical shift' of effective control to an international organ that was actually preceded by a horizontal agreement between the warring parties. Its discussion is relevant for the contextualisation of the newly developed methods of international crisis management through which horizontal agreements are incorporated (or 'confirmed') by the SC's reliance on Chapter VII.

##### (I) EASTERN SLAVONIA (1995)

On the margins of the Dayton Peace Agreement (DPA),<sup>89</sup> the Presidents of Croatia and

<sup>87</sup> Ragazzi, *Erga Omnes*, *supra* note 80, at 21.

<sup>88</sup> This approach is inspired by Váli's chapter on international servitudes as distinguished from territorial sovereignty (*Servitudes*, *supra* note 64, at 49 *et seq.*). Cf., however, the highly relevant comments of McNair who argued that international law's cautious reluctance to draw on the civil law of servitudes may be justified by the difference between *dominium* and *imperium*: "States are very sensitive – hypersensitive – on the question of sovereignty, and the very word 'servitude' has an ugly sound in the ear of a sovereign state's legal adviser or representative" ('State Servitudes', *supra* note 83, at 121-122).

<sup>89</sup> General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, Bosnia and Herzegovina – Croatia – Federal Republic of Yugoslavia, Paris, 14 December 1995, reproduced in 35 *ILM* 75 (1996). The case of post-conflict Bosnia can neither be placed in the context of second-generation peacekeeping, nor in the context of internationalisation developed here. The multi-layered system of international supervision established by the DPA resembles an indirect model of international administration. In his exercise of executive authority, the High Representative is authorised by Security Council which assumed the position of the ultimate guarantor of the peace

Serbia hammered out an arrangement that became known as the *Basic Agreement*, eventually signed between the government of Croatia and local Croat Serb authorities in November 1995.<sup>90</sup> The signatories called on the SC to establish a transitional administration to "govern the Region during the transitional period in the interest of all persons resident in or returning to the Region".<sup>91</sup> They also requested the Council to authorise an international force to maintain international peace and security. With the adoption of Resolution 1025 (1995), the SC invited the Secretary-General (SG) to draw up a report and make recommendations as to how the Basic Agreement might be implemented.<sup>92</sup> On 15 January 1996, acting under Chapter VII of the Charter, the SC decided to establish for an initial 12 month period a UN peace-keeping operation for the region – the United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium (UNTAES). The SC further requested the SG to appoint, in consultation with the parties, a Transitional Administrator to have overall authority over the military and civilian components of UNTAES, and to exercise the authority given to the Transitional Administration in the Basic Agreement.<sup>93</sup>

In what was later viewed as an extension of 'complex peacekeeping', the Security Council invoked Chapter VII of the Charter for the first time in order to establish a direct and comprehensive UN civil and military presence.<sup>94</sup> In accordance with the Basic Agreement and the relevant vertical instrument, the Transitional Administrator had the responsibility to effectively govern the UNTAES region, while gradually helping to reintegrate it into Croatia's legal system.<sup>95</sup> Following the successful holding of elections by UNTAES in 1997, the UN Transitional Administration developed an exit strategy which was described by the UN SG in the following terms:

In the first phase, the Transitional Administrator would devolve to Croatia executive responsibility for the major part of civil administration of the region while maintaining his authority and ability to intervene and overrule decisions should the situation deteriorate and

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process. The case of BiH does also not represent a 'pure' case of an actual divorce between *imperium* and *dominium*. Further references to BiH under international administration will be made later (Chapter VI.2.3 (ii), *infra* p. 230), albeit without explicit reference to the legal construction upon which 'joint administration' of the territory (i.e., by national and international authorities) is based.

<sup>90</sup> Basic Agreement on the Region of Eastern Slavonia, Baranja, and Western Sirmium (Erdut Agreement), Government of the Republic of Croatia – local Croatian Serb authorities (Erdut, 12 November 1995), UN Doc. S/1995/951, Annex reproduced in 35 *ILM* 184 (1996). Cf. also Richard Holbrooke, *To End a War* (New York: Random House, 1998), 238-239.

<sup>91</sup> Erdut Agreement, *supra*, at 185.

<sup>92</sup> See the *Report of the Secretary-General pursuant to Security Council Resolution 981 (1995)*, 982 (1995) and 983 (1995), S/1995/987, §29, and his report pursuant to S/RES/1025 (1995), S/1995/1028, §6.

<sup>93</sup> S/RES/1037, 15 January 1996

<sup>94</sup> For an account of Chinese resistance to the adoption of the mission's mandate under Chapter VII see Derek Boothby, 'The Political Challenges of Administering Eastern Slavonia', 10:1 *Global Governance* 37-51 (2004), at 45.

<sup>95</sup> Giovanni Cellamare, 'Note sull'amministrazione transitoria delle Nazioni Unite in Slavonia Orientale (UNTAES)', in *Divenire sociale ed adeguamento del diritto: studi in onore di Francesco Capotorti* (1999), at 83-97. The re-integration of Eastern Slavonia into Croatia's political and economic structures was carried out through a number of Joint Implementing Committees (JICs). See Jelena Smolenaar, 'International Administration and Socio-Economic Policy: UNTAES and the Regulation of Housing and Property Issues', Paper delivered at the SGIR 5<sup>th</sup> Pan-European Conference (The Hague, September 2004), at 8. Only the Transitional Administrator was in a position to make binding arrangements with the governments of Croatia, Serbia, or with local Serb authorities. Cf. Derek Boothby, *The UNTAES Experience. Weapons Buy-Back in Eastern Slavonia, Baranja, and Western Sirmium* (Bonn International Centre for Conversion, 1998), at 13.

the achievements of UNTAES be threatened. The pace of devolution would be commensurate with Croatia's demonstrated ability to reassure the Serb population and successfully complete peaceful integration. In the second phase, and subject to satisfactory Croatian performance, remaining executive functions would be devolved, with Croatia assuming responsibility for the continued demilitarisation of the region and the gradual reintegration of the transitional Police Force into the Croatian police force.<sup>96</sup>

Throughout its mandate the UNTAES force pursued a policy of negotiating public agreements with the Government of Croatia on the post-UNTAES implementation of its commitments and guarantees,<sup>97</sup> partly in order to assure and prepare the local population for the full transfer of authority. However, the characterisation of the legal basis for the exercise of powers proved controversial when determining whether it was Croatia or the SC who had the capacity to terminate UNTAES' activities.<sup>98</sup> When the original UNTAES mandate was extended by SC Resolution 1120 (despite strong objections of Croatia which argued that its powers of government should immediately resume), the Security Council's express reference to Chapter VII became significant. It precluded Croatia's arguments that those powers were conferred to it by Croatia on an *ad hoc* basis. In this light, the *Basic Agreement* represented nothing more than a request to the SC to exercise its Chapter VII powers and not, as Croatia would have wanted, a conferral of revocable powers.<sup>99</sup> The UNTAES mandate had been established by the SC's genuine reference to Chapter VII. It further manifested its authority when it decided to terminate UNTAES based on its evaluation that its mandate had been fulfilled.<sup>100</sup>

It is hard to overstate the importance of the Security Council's reference to Chapter VII. This new practice of utilising it as the genuine legal basis for the creation of an international administration represents a significant departure from the previous horizontal practice through which the SC had earlier accepted the explicit conferral of powers. A specific case in question was the 1991 Paris Peace Accords regarding Cambodia.<sup>101</sup> Since the SC Resolu-

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<sup>96</sup> *Report of the Secretary-General on the Situation in Croatia* (23 June 1997), S/1997/487, §48. The gradual empowerment of local institution and a commensurate devolution of international powers conditioned on the performance of local actors was endorsed in S/RES/1120, 14 July 1997, and would later provide the guiding principle of transferring international powers to the locally elected institutions of Kosovo.

<sup>97</sup> Cf. the brief account of the negotiations surrounding the signing of the Affidavit of Employment Rights, through which all public employees in the region would retain their employment status by Jacques-Paul Klein, 'The United Nations and Administration of Territory: The United Nations Transitional Administration in Eastern Slavonia (UNTAES)', 97 *ASIL Proceedings* 205-209 (2003), at 208.

<sup>98</sup> See Dan Sarooshi, *Some Preliminary Remarks on the Conferral by States of Powers on International Organizations* (Jean Monnet WP 4/03, NYU School of Law, 2003), at 17.

<sup>99</sup> Cf. *ibid.*, at 18. The Chapter VII basis was thus important since UN peacekeeping forces traditionally have no inherent capability to restore a situation in which consent for their activities wavers or evaporates. Cf. John MacKinlay, 'Military Responses to Complex Emergencies', in Thomas G. Weiss (ed.), *The United Nations and Civil Wars* (London: Lynne Rienner Publishers, 1995), at 54. With regard to the authorisation of IFOR through reliance on Chapter VII – not necessary but politically expedient – this is also the conclusion of Oliver Dörr, 'Die Vereinbarungen von Dayton/Ohio. Eine völkerrechtliche Einführung', 35 *AdV* 129-180 (1997), at 156-57.

<sup>100</sup> S/RES/1145, 19 December 1997. See also the statement of the President of the SC on behalf of the Council: S/PRST/1998/3, 13 February 1998.

<sup>101</sup> For three extensive accounts of the UNTAC mission see Steven R. Ratner, *The New UN Peacekeeping: Building Peace in Lands of Conflict after the Cold War* (New York: St. Martin's Press, 1995), at 157 *et seq.*; Michael W. Doyle and Nishkala Suntharalingam, 'The UN in Cambodia: Lessons for Complex Peacekeeping', 1 *International Peacekeeping* 117-143 (1994);

tion which established the United Nations Transitional Authority for Cambodia (UNTAC)<sup>102</sup> did not explicitly refer to Chapter VII of the Charter, the horizontal agreement between the parties provided the limits according to which the international mandate could be exercised. Hence UNTAC was required to comply with certain directions of the Supreme National Council that was defined as the "unique legitimate body and source of authority in which, throughout the transitional period, the sovereignty, independence and unity of Cambodia are enshrined".<sup>103</sup> UNTAC was therefore constrained to exercise its power within the context of the terms and conditions set out in the particular conferral.<sup>104</sup>

The trends of internationalisation, starting with the Saar Territory administration via the horizontal agreement and *ad hoc* conferral of governmental powers to UNTAC, to the administration of Eastern Slavonia based on a Chapter VII mandate illustrate the dynamic shift from horizontal to vertical instruments effectuating the transfer of *imperium*. They are also useful precedents when analysing the scope, principles and procedures through which an international presence assumed effective control in Kosovo, discussed in Chapter V.

## 1.2 UNITED NATIONS TERRITORIAL ADMINISTRATION AND THE VERTICAL IMPOSITION OF *IMPERIUM*

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Starting with the examples of Jerusalem and Trieste, this section will give a broad overview of the struggle over the correct legal basis of temporary UN territorial administration. It proceeds by discussing four more cases, in pairs: West Irian/Namibia illustrate the UN's increasing capacity to assume temporary administrative powers; Kosovo and East Timor exemplify the 'new' legal basis grounded in Chapter VII of the UN Charter.

### 1.2.1 THE STRUGGLE FOR A LEGAL BASIS: FROM ARTICLE 24 TO CHAPTER VII

The issue whether the League, and its successor, the UN, were authorised to assume administering powers *outside* the context of the Trusteeship System (that has always followed a formal trusteeship agreement between itself and a government responsible for administering a territory, based on Article 77 of the Charter) has been the subject of legal controversy. In particular, *Kelsen* favoured a restrictive interpretation of UN powers, claiming that "the Organization is not authorised by the Charter to exercise sovereignty over a territory, which does not have the legal status of a trust territory."<sup>105</sup> In the decade after WWII, one can, however, point at two examples of instances of recognition by UN members

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Dobbins et al., *UN's Role*, *supra* note 5, at 69-91.

<sup>102</sup> S/RES/745, 28 February 1992.

<sup>103</sup> Agreements on a Comprehensive Political Settlement of the Cambodia Conflict, Paris, 23 October 1991, Art. 3 and 5, 31 *ILM* 183 (1991). According to Matheson, UNTAC's "authority was limited by the requirement that UNTAC follow any 'advice' approved by a consensus of the factions represented in the Supreme National Council, to the extent that it did not conflict with the Agreement" ('Governance', *supra* note 33, at 77).

<sup>104</sup> For an in-depth legal analysis of the distribution of competencies between UNTAC and the SNC see Frank E. Hufnagel, *UN-Friedensoperationen der zweiten Generation. Vom Puffer zur neuen Treuhand* (Berlin: Duncker&Humblot, 1996), at 107-138.

<sup>105</sup> Hans Kelsen, *The Law of the United Nations. A Critical Analysis of Its Fundamental Problems* (London: Stevens&Sons, 1950), at 651.

that the United Nations possessed the capacity to administer or supervise the administration of territories *other* than trustee territories.

(i) JERUSALEM AND TRIESTE (BOTH 1947)

By a series of Resolutions in 1947 and 1948,<sup>106</sup> the GA determined that the city of Jerusalem should be placed under a special international regime under effective UN control. Article 1 of the draft Statute establishing the regime explicitly constituted Jerusalem as a "*corpus separatum* under the administration of the United Nations".<sup>107</sup> As expressly stated, the city was not to be a trust territory, and Chapters XII and XIII of the UN Charter were not applicable.<sup>108</sup> Yet the Governor of the city, who was entrusted "on behalf of the United Nations", was to be appointed by, and responsible to, the Trusteeship Council.<sup>109</sup> Moreover, the Governor was given power to conduct the external affairs of the city and to conclude treaties on its behalf.<sup>110</sup> Safeguarded by the Security Council, the framework put in place was, as *Berman* aptly remarked, a masterpiece of international legal imagination, "embodying the entire range of international legal solutions for the problem of nationalism".<sup>111</sup> It provided for the internationalisation of the city under the Trusteeship Council, subject to plebiscitary review after ten years. In its call for two states it supplied an opportunity for self-determination and provided guarantees for each of the minorities in the two new states. Finally, it envisaged the supranational integration of the city in the form of a Joint Economic Board, with multiethnic participation under UN auspices.<sup>112</sup>

The second example which illustrates the novel solutions suggested in the context of internationalisation is that of Trieste. The annexes to the Treaty of Peace with Italy conferred upon the SC certain limited governmental functions over the proposed Free Territory of Trieste.<sup>113</sup> Although the Statute never entered into force, it still provides some evidence of the recognition by the signatories of the Treaty of the capacity of the UN to supervise the administration of a territory. The Permanent Statute, if adopted, would have provided that

[t]he integrity and independence of the Free Territory shall be assured by the [UN SC]. This responsibility implies that the Council shall: (a) ensure the observance of the present Statute and in particular the protection of the basic human rights of the inhabitants, (b) ensure the

<sup>106</sup> A/RES/181 (A+B) (II), 29 November 1947, UN Doc. A/64, at 131 (1947); Cf. also A/RES/303 (IV), 9 December 1949.

<sup>107</sup> Statute for the City of Jerusalem, Article 1. UN TCOR, 6<sup>th</sup> session, 4 April 1950, UN Doc. T/592.

<sup>108</sup> Cf. Kelsen, *United Nations*, 1950, *supra* note 105, at 687 (with citations).

<sup>109</sup> Cf. *Statute*, *supra* note 107, Article 12 and 13.

<sup>110</sup> *Ibid.*, Art. 37(5 and 6).

<sup>111</sup> Berman, 'Jerusalem', *supra* note 24, at 825.

<sup>112</sup> For a discussion of the 'degree' of Jerusalem's envisioned internationalisation cf. Beck, *Internationalisierung*, *supra* note 82, at 49-52. The discussions in the Trusteeship Council (and the eventual collapse of the internationalisation project) are summarised by Nicolas Veicopoulos, *Traité des territoires dépendants*, vol II (Athens, 1971), §§1192-1195.

<sup>113</sup> Treaty of Peace with Italy, Paris, 10 February 1947; 49 UNTS 126, 187. Annex VI supplied the Permanent Statute (pending a decision of the SC on its coming into force). Trieste's envisioned internationalisation is discussed by Beck in *Internationalisierung*, *supra* note 82, at 41-47; Verzijl, *International Law*, vol. II, *supra* note 37, at 504-5; and A. Gervais, 'Le statut de Trieste', 51 *RGDIP* 134 (1947). The powers were never actually assumed because of inability to reach agreement in the SC on the details of the administration.

maintenance of public order and security in the Free Territory.<sup>114</sup>

When the SC discussed the approval of the Permanent Statute in 1947, some members of the Council were of the opinion that it was not empowered to act as supreme governing body of a territory with the ultimate authority over its people, because such functions would have no direct connection to maintaining peace and security.<sup>115</sup> They maintained that the Council's responsibility could only be exercised through the specific powers granted for that purpose in Chapters VI, VII, VIII, and XII which, in their opinion, did not confer upon the Council sufficient authority to exercise the functions stipulated in the Permanent Statute.<sup>116</sup> In response to these objections, other representatives pointed either to the Council's implicit powers or to the spirit of the Charter. The French representative, for instance, deprecated that "world opinion would certainly not understand it, if the Security Council were to give the impression of evading a responsibility so closely related to the maintenance of international peace and security, as it is precisely [its] main task and responsibility".<sup>117</sup> Arguing on similar teleological basis, the Polish delegate stated that "it would be entirely within the general spirit of the Charter...if it were decided to form a Free Territory under a quasi-international administration."<sup>118</sup>

A consensus emerged, according to which the necessary authority to administer a territory could be found in Article 24. On the question of the Permanent Statute for Trieste, Secretary-General Lie argued that the words, "primary responsibility for the maintenance of international peace and security", coupled with the phrase "acts on their behalf", constituted a sufficiently wide legal basis for assuming (temporary) governmental authority, since the UN members had thereby conferred "powers commensurate with its responsibility for the maintenance of peace and security" upon the Council, limited only by the fundamental principles and purposes of the Charter.<sup>119</sup>

## (II) WESTERN IRIAN (1962) AND NAMIBIA (1967)

The exercise of administering territories, as well as the emerging practice to establish UN forces, would find a potent functional justification in what was termed the doctrine of 'implied

<sup>114</sup> Peace Treaty with Italy, *supra* note 113, Article 2.

<sup>115</sup> See the statements of the Representatives of Syria and Australia, *Repertoire of the Practice of the Security Council, 1946-1951*, 482-3 (Syria) and 484 (Australia).

<sup>116</sup> This referred particularly to Article 19 of the Statute which recognised the competence of the SC to prevent legislation from coming into force. Due to those irreconcilable positions, the territorial conflict had to await a horizontal solution which was only arrived at in 1975. For the Osimo Accords between Italy and Yugoslavia, see Eckart Klein, *Statusverträge im Völkerrecht. Rechtsfragen territorialer Sonderregime* (Berlin-Heidelberg-New York: Springer Verlag: 1980), at 39-40.

<sup>117</sup> SCOR (II), 89<sup>th</sup> meeting 16 (1947).

<sup>118</sup> *UNSC Repertoire*, *supra* note 115, at 483. Cf. also the discussion of the Trieste case and its significance for the development of the residuary power of the Security Council by Oscar Schachter, 'The Development of International Law through the Legal Opinion of the United Nations Secretariat', 25 *BYIL* 91-132 (1948), at 96-101. Seyersted noted correctly that the failure of the UN to exercise territorial jurisdiction in Jerusalem and Trieste was not a *prima facie* indication of the absence of its legal capacity but due to the external reason that most of the territory was under the control of states ('United Nations Forces: Some Legal Problems', 37 *BYIL* 351-475 (1961), at 453).

<sup>119</sup> *UNSC Repertoire*, *supra* note 115, at 483. With the adoption of Resolution 16 of 10 January 1947 and the 'Permanent Statute', the Security Council followed the opinion of the SG.

powers'.<sup>120</sup> A decade after the two unsuccessful attempts to establish its authority over Jerusalem and Trieste, the United Nations accepted full responsibility for governing the territory of West Irian (West New Guinea), based on an Agreement between Indonesia and the Netherlands,<sup>121</sup> which provided that the United Nations Temporary Executive Authority (UNTEA) would "have full authority under the direction of the Secretary General to administer the territory".<sup>122</sup> When UNTEA eventually assumed actual responsibility for the territory, and effectuated a transition of governmental power from one authority to another, the Charter basis for doing so remained uncertain. The approach followed in the case of Trieste had, in a sense, been sounder, as it clearly spelled out the components of a policy that were supposed to lead the internationalisation of the territory: First, an international regime for the territory was deemed *necessary*; second, the UN was the most *appropriate agency* for assuming the supervision of such regime; and third, that this rôle could be *justified* under Article 24 of the Charter, which vests the Security Council with the primary responsibility for maintaining peace and security.

The United Nations' assumption of governmental authority over a territory became the subject of debate with the establishment of the UN Council for Namibia in 1967.<sup>123</sup> In 1966, the GA had adopted Resolution 2145 (XXI), by which it terminated the mandate of South Africa over Namibia and placed the territory under the direct responsibility of the United Nations. In the following year, the GA created the United Nations Council for Namibia, initially comprising eleven member States.<sup>124</sup> A conspicuously high number of states, however, abstained from voting for the relevant Resolution.<sup>125</sup> They were clearly concerned that the GA would not have the competence to confer such extensive legislative powers upon a thus created UN Council. Though it did not explicitly address the legal basis for the establishment of the Council, the ICJ couched its language very much in the line of reasoning developed in the Trieste determination, when it observed that "Article 24 of the Charter vests in the Security Council the necessary authority to take actions such as that

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<sup>120</sup> For a comparison of the three different views expressed by the ICJ in its Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations* (ICJ Reports [1949] 174, especially at 174 and 182) on the question of implied powers see Gerald Fitzmaurice, 'The Law and Procedures of the International Court of Justice: International Organizations and Tribunals', 29 *BYIL* 1-62 (1952), at 5-6. On the issue of inherent powers of the UN to establish and command forces, see Seyersted, 'United Nations Forces', *supra* note 118, at 460 *et seq.*

<sup>121</sup> Essentially containing the US-proposed 'Bunker plan' that suggested a transfer of Dutch authority to a temporary executive authority under the supervision of the UN SG. Cf. Agreement Concerning West New Guinea (West Irian)/West Papua, Indonesia – Netherlands, 15 August 1962, UN Doc. A/5170, Annex C, 1-21, 437 UNTS 274.

<sup>122</sup> A/RES/1752 (XVII), 21 September 1962. On 1 May 1963 the administration of the territory was transferred by the UNTEA to Indonesia while the formers preparatory task and responsibility in the future 'act of self-determination' – as stipulated in the August 15 Agreement – was minimised. For two highly critical accounts of the UN's administration of West Papua, especially its failure to resist to Indonesian political calculus, see the two studies by John Saltford, *The United Nations and the Indonesian Takeover of West Papua, 1962-1969. The Anatomy of Betrayal* (London: Routledge Curzon, 2003), and Paul W. van der Veur, 'The United Nations in West Irian: A Critique', 18:1 *International Organization* 53-73 (1964).

<sup>123</sup> The case of Namibia is dealt with in greater depth in Chapters II.2.3 and IV.3 of this thesis.

<sup>124</sup> A/RES/2248 (S-V) of 19 May 1967, UN Doc. A/6657/Supp. 1 (1967).

<sup>125</sup> Resolution 2248 was adopted by 85 votes to 2 with 30 abstentions. On the attitude of governments towards Resolution 2248 see the Report by the Secretary-General, *Compliance of Member States with the United Nations Resolutions and Decisions Relating to Namibia, Taking into Account the Advisory Opinion of the International Court of Justice of 21 June 1971*, 12 March 1975, UN Doc. A/AC.131/37.

taken in the present case".<sup>126</sup>

In short, the authority of the UN Security Council to alter or abrogate territorial rights against the wish of the sovereign, or its capacity to convey title to territorial disposition, was fiercely contested. It was argued that the creation of the Council for Namibia, and via this precedent, the creation of an international territorial administration, could be based on an analogous application of Article 81, despite the lack of a trusteeship agreement within the sense of Article 79 of the Charter.<sup>127</sup> In his dissenting opinion in the 1971 *Legal Consequences* case, Judge *Fitzmaurice* stated that, on the other hand, "[t]he Security Council might, after making the necessary determinations under Art. 39..., order the occupation of a country or piece of a territory to restore peace or security, but it could not thereby, or as part of that operation, abrogate or alter territorial rights".<sup>128</sup> Even more cautious was the oral statement of the representative of the UN Secretary-General at the prior pleadings who suggested that "a situation, dispute, threat or breach of the piece is hardly conceivable in which the Security Council would be in a position to call upon a sovereign State to withdraw its administration from a part of its territory".<sup>129</sup> Thirty years later, however, scholarly opinion seems to lean towards a contingent and case by case justification that would enable the SC to direct a permanent change in some aspects of status, boundaries, political structure, or legal system of a territory within a state, if the Council should determine that doing so is necessary to restore and maintain international peace and security.<sup>130</sup>

#### 1.2.2 IMPOSING THE DIVORCE: CHAPTER VII AND THE APPROPRIATION OF EFFECTIVE CONTROL BY THE UNITED NATIONS

The preceding discussion emphasised that for a 'protecting entity' to exercise effective control in accordance with international law, the ceding state must have authorised the transfer of effective control through an international agreement<sup>131</sup> by which it manifests its

<sup>126</sup> ICJ Advisory Opinion, 1971, *supra* note 56, at 52. Discussing whether Article 24 furnishes the necessary authority for the administration by the UN, Haldeman suggested that "in the absence of any reasonable specific authority for such action in the Charter, and of any apparent intent on the part of the framers to include such authority, it is believed to be the best solution of the resulting problem to regard the Council action...as the first step in a potential process of Charter modification...through practice and acquiescence of the members" ('United Nations Territorial Administration and the Development of the Charter', 95 *Duke LJ* 95-108 (1964), at 99).

<sup>127</sup> Klein, *Statusverträge*, *supra* note 116, at 303: "Territorial zuständig sind...die Vereinten Nationen, ...die in analoger Anwendung von Art. 81 SVN zur Administration befugt sind. In Ausübung dieser Befugnis hat die Generalversammlung den 'Council for Namibia' errichtet." Cf. also Lawrence Herman, 'The Legal Status of Namibia and of the United Nations Council for Namibia', 13 *Canadian YIL* 306-322 (1975), at 319-322.

<sup>128</sup> *Namibia* opinion, *supra* note 56, at 294.

<sup>129</sup> Oral Statement by Mr. Vickers, Representative of the UN SG, in the context of the ICJ Pleadings in the 1971 *Legal Consequences* case. See ICJ Pleadings, Vol. II, at 486.

<sup>130</sup> Matheson, 'Governance', *supra* note 33, at 85. He takes this extensive interpretation from a reading of Art. 41 which recites a list of possible measures that may be employed to give effect to its decisions. He argues that the list, clearly being exemplary and non-exhaustive, would not limit the Council in deciding on different steps or instruments. For references to authors disagreeing with such a wide interpretation of SC competencies see Chapter V.3.1, *infra* note 734.

<sup>131</sup> The term *Verwaltungszession* (administrative cession), frequently used in German legal literature (cf. Verdross et. al., 'Gebietshoheit', *supra* note 61, at 241 and Verzijl, *International Law*, *supra* note 37, vol. III, at 408), appears inadequate to approach the phenomenon in question. Cession, one of the modes through which territory can be acquired in international law, involves the peaceful transfer of territory from one sovereign to another. The basis of cession lies in the



intention to create, change, or define legal relationships. *Absent such agreement*, the assumption of effective control by a 'protecting entity', must have another legal basis in international law. Even without the consent of a state, the SC might be empowered to *order a transfer* of effective control over territory to a 'protecting entity' based on Chapter VII of the UN Charter. The unease with which jurists viewed the emerging dynamics that would later lead to the advent of plenary systems of international administration vertically imposed by the SC was best summarised by Judge *Weeramantry* in the 1995 *East Timor* case when, in his dissenting opinion, he pronounced his scepticism that a UN organ could ever take over the responsibilities of the administering power:

It is true indeed that the General Assembly and the Security Council, in all their plenitude of power, preside over the great task of decolonisation and protection of dependent peoples. Yet, with all respect, they are no substitutes for the particular attention to the needs of each territory, which the Charter clearly intends to achieve. Protection from internal exploitation and external harm, day-to-day administration, development of human rights, promotion of economic interests and well-being, recovery of wrongful loss, fostering of self-government, representation in world forums, including this Court – all these require particular attention from a Power specifically charged with responsibility in that regard. [...] In the absence of an administering power, there would be a total neglect of that function and hence an impairment of United Nations supervision.<sup>132</sup>

In the context of trusteeship administration, those considerations were certainly adequate. However, beyond the confines of Chapter XII of the Charter, *Weeramantry's* unease proved obsolete even at the time of his writing, given that (i) the Trusteeship Council (Jerusalem), and (ii) the Security Council (Trieste) had been found competent to assume functions of direct multilateral administration, and (iii) the General Assembly (Namibia), and (iv) the Secretary-General (West Irian) had actually assumed those functions in the subsequent decades. The cases of Kosovo and East Timor, put under international administration only four years after the ICJ's *East Timor* dictum illustrate the SG's newly manifested authority, delegated to him by the Security Council, to administer territory through his subsidiary organ. Those cases also represent the latest instances in which the SC chose to divorce sovereign title and *imperium* over territory.

#### (I) KOSOVO AND EAST TIMOR (BOTH 1999)

The problems surrounding the imposed divorce between sovereign claims and effective control have crystallised in two UN Security Council resolutions adopted in 1999. On 10 June 1999, the SC adopted Resolution 1244, authorising the Secretary-General to establish "an interim administration...under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia".<sup>133</sup> Only a few months later, on 25 October 1999, the SC decided to establish an interim administration endowed with "overall responsibility for the administration of East Timor", including "all legislative and executive authority" and the administration of justice.<sup>134</sup> Both UNMIK and UNTAET, as these administrations were subsequently named, were created on the basis of Chapter VII of the UN Charter, and in both

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intention of the relevant parties to transfer sovereignty. In the cases discussed, only effective control – and not the sovereign *dominium* – has been transferred.

<sup>132</sup> ICJ Reports [1995], *supra* note 57, at 181.

<sup>133</sup> §10 of S/RES/1244, 10 June 1999.

<sup>134</sup> §1 of S/RES/1272, 25 October 1999.

cases an international territorial administration assumed exclusive administrative authority over territories placed under their effective control and supervision.

The deployment of UNMIK arguably broke with a traditional requirement that UN peacekeeping operations would have the consent of the host state.<sup>135</sup> Formally, the UN did follow its tradition of seeking the host government's consent before deploying a UN peacekeeping mission into a post-conflict setting.<sup>136</sup> The end of NATO's air campaign was, however, conditional on the approval of the Kumanovo agreement<sup>137</sup> by the FRY, which recorded the latter's consent that KFOR would deploy with the authority to take all necessary action to establish and maintain a secure environment.

Doubts have recently been expressed as to the legal validity of the Kumanovo Agreement endorsed by the Security Council in its Resolution 1244.<sup>138</sup> Indeed, the transfer of effective control from the FRY to an international territorial administration in 1999 occurred in circumstances that would not qualify as a voluntary agreement. According to a general principle codified in the common Article 52 of the 1969 *Vienna Convention on the Law of Treaties* and the 1986 *Convention on the Law of Treaties between States and International Organizations*, a treaty (of which FRY's acceptance of a phased withdrawal of its military is an example) "is void if its conclusion has been procured by the threat or use of force". Although coercion was indeed an objective element affecting the validity of the agreement, the view that the invalidity of the horizontal agreement should extend to the vertical instrument (i.e. Resolution 1244) is certainly misguided. The Kumanovo Agreement, similar to the horizontal agreement signed in 1995 at Erdut in which Croatia and local Croat Serb authorities agreed to establish a transitional Administration,<sup>139</sup> was superseded by the SC's reliance on Chapter VII. The question whether the Kumanovo Agreement ought to be considered null and void *ab initio*, or whether it produced some legal effects by the coerced party's subsequent acquiescence,<sup>140</sup> is therefore moot. As *Tomuschat* notes, it is clear that

<sup>135</sup> This principle was first stated by SG Hammarskjöld in his 1956 report to the General Assembly on the first major UN peacekeeping operation, UNEF (established by the GA in the Middle East from 1956 to 1967, and operating under a *Status of Forces Agreement (SOFA)* with the host state establishing the rights and privileges of the UN forces). It served to differentiate peacekeeping from the employment of UN personnel in conflict situations under a Chapter VII mandate. Cf. Christine Gray, *International Law and the Use of Force* (OUP, 2000), at 152 and 183; Ratner, *New UN Peacekeeping*, *supra* note 101, at 51; and Erik Suy, 'Peacekeeping Operations', in *Manuel sur les organisations internationales* (Hague Academy of International Law, ed. by R.-J. Dupuy, The Hague: M. Nijhoff, 1988), at 387-90. On UNEF in particular see Mona Ghali, 'United Nations Emergency Force I: 1956-1967', in *The Evolution of UN Peacekeeping. Case Studies and Comparative Analysis* (ed. by W.J. Durch, New York: St. Martin's Press), 104-130.

<sup>136</sup> The Kosovo peace plan, negotiated between the Finnish President, the Special Envoy of the Russian President, and the Yugoslav President was subsequently ratified by the Serbian parliament and annexed to S/RES/1244. The Decision by the Serbian National Assembly of 3 June 1999 is reprinted in Philip and David Auerswald, *The Kosovo Conflict. A Diplomatic History Through Documents* (Cambridge/The Hague: Kluwer Law, 2000), at 1079.

<sup>137</sup> Military Technical Agreement (MTA) between the International Security Force ('KFOR') and the Governments of the FRY and the Republic of Serbia, Kumanovo (FYRoM), 9 June 1999, UN Doc. S/1999/682, 38 *ILM* 1217 (1999). The agreement was signed by Lt. General Jackson, on behalf of NATO, and by Col. General Marjanovic of the Yugoslav Army as well as Lt. General Stevanovic of the Ministry of Internal Affairs, on behalf of the Governments of the FRY and Serbia.

<sup>138</sup> Enrico Milano, 'Security Council Action in the Balkans: Reviewing the Legality of Kosovo's Territorial Status', 14:5 *EJIL* 999-1022 (2003).

<sup>139</sup> On the Erdut Agreement and the deployment of UNTAES, see *supra* note 90.

<sup>140</sup> Cf. Milano, 'Action', *supra* note 138, at 1018.

such expression of consent does not alter the intrinsic nature of a resolution of the Security Council... Notwithstanding such a consensual pre-stage of the decision-making process, resolutions of the [SC] remain unilateral acts, which are not dependent upon the continuation in time of the consent given... The legal position is not changed... by the conclusion... of the [Kumanovo Agreement]. As its name indicates, this agreement regulates details of the deployment of KFOR troops. It does not constitute an independent legal basis for that deployment.<sup>141</sup>

What is valid for the deployment of military forces must also be true for the UN-mandated deployment of a civilian force. UNMIK was not set up under the terms of the Kumanovo Agreement. Its authority is hence not – as sometimes argued in literature – based on a ‘double footing’, a Chapter VII resolution on the one hand, and the consent of the host state, on the other.<sup>142</sup> The normative quality of Resolution 1244, it is submitted, lies in its vertical imposition of the transfer of effective control, and not in its endorsement of such a transfer through a horizontal agreement. Chapter VII of the UN Charter was employed as the legal basis for the establishment of an international territorial administration that also (temporarily) suspended the FRY’s jurisdiction. This was perceived as a necessary measure to restore international peace in the region within the meaning of Article 39 of the Charter.

It follows from the Charter that the adoption of enforcement measures by the Security Council, including the appropriation of *imperium* over territory and its transfer to one of its organs,<sup>143</sup> is not limited by the principle of non-interference since Article 2(7) expressly states that the principle of domestic jurisdiction shall not prejudice the application of enforcement measures adopted under Chapter VII. In the absence of a treaty (analogous to the Trusteeship Agreement with the territorial state contained in Art. 77 of the Charter), the

<sup>141</sup> Christian Tomuschat, ‘Yugoslavia’s Damaged Sovereignty over the Province of Kosovo’, in *State, Sovereignty, and International Governance* 323-347 (ed. by Gerard Kreijen et al., Oxford: OUP, 2002), at 339. Frowein employs a similar line of argument: „man wird [die Zustimmung der Bundesrepublik Jugoslawien zur Einsetzung der zivilen Verwaltung für das Kosovo] vor allem als praktisch bedeutsam ansehen müssen; dagegen nicht annehmen können, daß diese rechtlich notwendig ist. Wenn die Zuständigkeit des Sicherheitsrates nach Kapitel VII auf der Grundlage einer Friedensgefährdung oder Friedensstörung, wie sie nach Art. 39 umschrieben ist, vorliegt, kann der Sicherheitsrat in einer derartigen Lage eine Territorialverwaltung einsetzen, wenn das die einzige Möglichkeit ist, um friedliche Verhältnisse zu gewährleisten“ (‘Notstandsverwaltung von Gebieten durch die Vereinten Nationen’, in *Völkerrecht und deutsches Recht, Festschrift für Walter Rudolf* 43-54 (ed. by H.-W. Arndt et al., München: Ch. Beck, 2001), at 44).

<sup>142</sup> As argued, e.g., by Leopold von Carlowitz, ‘UNMIK Lawmaking between Effective Peace Support and Internal Self-determination’, 41 *Archiv des Völkerrechts* 336-393 (2003), at 343. See also Niels van Willigen, ‘International Administration: Legal but Illegitimate?’, Paper delivered at the SGIR 5<sup>th</sup> Pan-European Conference (The Hague, September 2004), at 7. For an entirely mistaken approach to the incidence of UN plenary administrations cf. Epaminontas E. Triantafyllou, ‘Matter of Law, Question of Policy: Kosovo’s Current and Future Status under International Law’, 5 *Chicago JIL* 355 (2004).

<sup>143</sup> The wording of Art. 41 of the UN Charter grants the Council wide discretion as to the range of measures necessary for the maintenance of international peace. The list of measures expressly referred to is not exhaustive. It is a testimony to the ever-increasing importance of the SC that, in the 1990s, international territorial administrations were established as subsidiary organs under the authority of the SC and not of the GA: UNTAC (United Nations Transitional Authority in Cambodia, 1992-3), UNMIK and UNTEAT as well as UNMIBH (UN Mission in Bosnia and Herzegovina which exercised administrative functions in relation to, and was in charge of the restructuring of, the UN International Police Task Force) were (and in case of UNMIK, are still) administered by the SG pursuant to Art. 98. While the SG performs functions entrusted to him by the SC, the delegation of the establishment of subsidiary organs to the SG does not remove these organs from the ambit of the SC (Art. 29). Cf. Andreas Paulus ‘Article 29’, in *The Charter of the United Nations. A Commentary* (Vol. I, 2<sup>nd</sup> ed. by B. Simma, Munich, 2002), at 553. The nature of a UN administration mission as subsidiary organ of the SG will be clarified in Chapter IV.1.2, *infra* p. 126.

Security Council can authorise, and thus create a title for, the temporary transfer of *imperium* to an international territorial administration without the invitation of the target state in situations that it determines to be a threat to international peace in accordance with Articles 41 and 42 respectively.<sup>144</sup>

The history of UN intervention in East Timor in 1999 exemplifies the dynamic shift between horizontal and vertical tendencies that was to propel the UN into assuming the wholesale administration of the territory later that year. The Security Council adopted Resolution 1246, establishing the United Nations Administration Mission in East Timor (UNAMET) to organise a popular consultation, based on a tripartite agreement with Indonesia and Portugal regarding the modalities of its conduct.<sup>145</sup> Violence escalated in the wake of the vote, and Indonesia expressed its readiness to accept an offer of assistance. The SC, acting under Chapter VII, established the International Force for East Timor (INTERFET) which took over all security functions from Indonesia and was authorised to use all necessary means to fulfil its mandate. In a tripartite meeting with the UN SG, Indonesia and Portugal affirmed their agreement that governing authority should be transferred to the United Nations.<sup>146</sup> After the result of the popular consultation was recognised by the Indonesian People's Consultative Assembly, the SC adopted Resolution 1272 (1999), establishing the Transitional Administration (UNTAET) to take overall responsibility for the administration of the territory,<sup>147</sup> powers that went far beyond the initial agreement of 5 May 1999. In what could be termed a complex peace-keeping mandate,<sup>148</sup> UNTAET was given multiple assignments beyond 'traditional duties', including political, electoral, and informational components.<sup>149</sup>

<sup>144</sup> For Ruffert, direct territorial administration complies with Chapter VII through the application of the implied-powers doctrine developed by the ICJ ('The Administration of Kosovo and East Timor', 50:3 *ICLQ* 613-631 (2001), at 620.

<sup>145</sup> S/RES/1246 (1999), 11 June 1999, based on the *Agreement Regarding the Modalities for the Popular Consultation of East Timor through a Direct Ballot*, 5 May 1999. The 5 May Agreement consisted, as Lissauer correctly notes, of three parts: the first, an agreement between the two governments witnessed by the UN SG (providing for a conclusion of the dispute over the status of the territory), and the second and third parts which are tripartite agreements between the two governments and the SG (on the modalities of the popular consultation under the auspices of the UN and the security arrangements thereto). Cf. Gyorgy B. Lissauer, *Government by the International Community: Establishing United Nations Administered Territories. The Case of Kosovo and East Timor* (M.Phil. thesis on file with Oxford University, 2002), at 30. Resolution 1246 based the justification for the creation of UNAMET both on the Agreement and on earlier GA pronouncements affirming East Timor's right of self-determination as a non-self-governing territory (compare the references in S/RES/1264 to A/RES/1514 (XV) and 2625 (XXV) via S/RES/1236).

<sup>146</sup> *Report of the Secretary-General on the Situation in East Timor* (4 October 1999), UN Doc. S/1999/1024 (1999), §25.

<sup>147</sup> S/RES/1272, 25 October 1999.

<sup>148</sup> S/RES/1264, 15 September 1999. Whether the reference to Chapter VII was legally necessary or not remains contested. Indonesia had in principle expressed its readiness to accept an international peacekeeping force in the 5 May Agreement. In itself, this would have eliminated the barrier of domestic jurisdiction established by Art. 2(7) of the UN Charter. Invoking Chapter VII, had, however, the practical advantage that the Security Council could vest the multinational force with a robust mandate that included the use of 'all necessary measures', including the use of force. In addition, as Rothert observes, "had the Security Council not acted under the authority of Chapter VII, INTERFET would have been subject to Indonesia's withdrawal of consent" ('U.N. Intervention in East Timor', 39 *Columbia JTL* 257-282 (2000-1), at 274).

<sup>149</sup> For a concise study of UNTAET's performance in all sectors of its mandate see Conflict Security and Development Group, *A Review of Peace Operations: A Case For Change? East Timor* (Kings College, 10 March 2003).

Arguably, the creation of the international territorial administration in East Timor revolutionised the extent to which a UN organ could be vested with effective control and step into the administrative vacuum. UNTAET has not met with restraints of (suspended) sovereignty claims comparable to those of UNMIK as the United Nations had never recognised Indonesia's exercise of administrative power as legal.<sup>150</sup> In an exchange of notes constituting an Agreement with Australia, UNTAET had assumed all rights and obligations previously exercised by Indonesia under the Timor Gap Treaty "until the date of independence of East Timor".<sup>151</sup> Some authors therefore claim that UNTAET, along with the assumption of effective control, had acquired temporary sovereignty over the territory. Chopra, for instance, notes that "it is the first time sovereignty has passed to the UN independently of any competing authority".<sup>152</sup> In a similar vein, Zimmermann and Stahn suggest that UNTAET was a unique operation for it was the first time that the UN exercised what they call "full and exclusive sovereignty over a territory".<sup>153</sup> Due to the lack of *animus possidendi* on the part of the UN, this suggestion is untenable, at least when applying the positivist object theory. It may be suggested, however, that UNTAET has replaced Portugal as an administrative power without sovereign rights, save in its capacity as custodian of the rights to self-determination of the East Timorese people, and thus temporarily assuming title, alongside *imperium*, on behalf of the people that were to constitute themselves as a polity in due course.<sup>154</sup>

By way of summarising our discussion of state practice, the following table compares selected cases in which territories were treated as external objects of states in accordance with the doctrine of disjunction, as outlined above. These cases are distinguished according to the recipient of the transfer of effective control, with single state entities on the left and multilateral agencies on the right side.

<sup>150</sup> Jarat Chopra, *Introductory Note to UNTAET Regulation 13*, 39 *ILM* 936-938 (2000), at 937.

<sup>151</sup> Cf. 9 *Australian Treaty Series* (2000). For a discussion of UNTAET's role with regard to re-negotiating the East Timor Gap Treaty on behalf of East Timor, see Chapter V.2.1 (i), *infra* p.166

<sup>152</sup> Chopra, 'Kingdom', *supra* note 9, at 29. He repeats his (misguided) assertion that 'Resolution 1272 was the instrument for bestowing sovereignty over East Timor to the UN' in 'Building State Failure in East Timor', 33:5 *Development & Change* 979-1000 (2002), at 984.

<sup>153</sup> Andreas Zimmermann and Carsten Stahn, 'Yugoslav Territory, United Nations Trusteeship or Sovereign State? Reflections on the Current and Future Legal Status of Kosovo', 70 *Nordic JIL* 423-460 (2001), at 434.

<sup>154</sup> It may be significant in this respect that several commentators suggest that the residual sovereignty over territories placed under Mandate rested with the League of Nations. This view will be discussed in the next chapter.

(II) TABLE: DISJUNCTION BETWEEN SOVEREIGN TITLE AND EFFECTIVE CONTROL IN STATE PRACTICE; SELECTED EXAMPLES SINCE 1878

Transfer to a state	Legal basis Int'd duration	Transfer to an international organisation (‘internationalised territory’) by horizontal and vertical means	Legal basis	Duration
Turkey ceded effective control over Bosnia-Herzegovina to Austria (Treaty of Berlin, 13 July 1878) which occupied and administered the territory with Turkey remaining the titular sovereign.	Treaty permanent	Germany renounced the government of the Saar Territory by the LN (Peace Treaty of Versailles, 28 June 1919). Between 1920 and 1935, Germany’s territorial sovereignty was reduced to a <i>nudum jus</i> .  Also at Versailles, Danzig was severed from Germany and constituted as a ‘Free City’ under the protection of the LN (17 November 1920) and a High Commissioner appointed by it.	Treaties	temporary
Turkey ceded effective control over Cyprus to Great Britain (Treaty of Alliance, June 1878), Turkey remained territorial sovereign.	Treaty conditioned	Following a confrontation between Peru and Colombia over the control of the port of Leticia, the parties agreed to transfer effective control over the territory to the LN (Geneva Agreement, May 25, 1933) before it was returned to Colombian jurisdiction.	Agreement, LN Recomm.	temporary
In 1898, China leased 4 territories to the German Empire (Bay of Kiauchau, 6 March 1898), to Russia (Port Arthur, 7 March 1898), to France (Kwang-chou-wan), and to Britain (Weihaiwei, 1 July 1898), without explicitly transferring territorial title.	Treaties temporary lease	By A/RES/181 (A+B) (29 November 1947), the GA. endorsed the proposal of UNSCOP that envisaged Jerusalem be placed under an international regime, constituting it as ‘a <i>corpus separatum</i> ’. The Trusteeship Council, to which the Governor would be accountable, was designed to discharge the responsibilities of the UN in this regard. The plan was rejected and never entered into force.	A/RES	never implemented
		Following the Peace Treaty with Italy (10 February 1947), the ‘Free Territory of Trieste’ was envisaged as an independent state entity based on a ‘Permanent Statute’ under the direct control of the SC and administered by a Governor to prevent it from being annexed by Italy or YU.	Treaty, approval by the SC	never implemented
Cuba transferred the exercise of jurisdiction and control over Guantánamo to the United States (Lease Agreement of 2 July 1903) while the U.S. recognised the continuance of the suspended, yet ‘ultimate sovereignty’ over the naval station by the Republic of Cuba.	Treaties permanent	A compromise reached between the Netherlands and Indonesia (Agreement of 15 August 1962) stated that UNTEA would take over full territorial control of West Irian (West New Guinea), to be followed by a hand over of authority to Indonesia and a popular consultation.  By A/RES/2145 (XXI) of 1966, the GA terminated South Africa’s mandate over South West Africa (Namibia), thus placing it under the direct responsibility of the UN Council for Namibia. South Africa responded by declaring its intention not to withdraw from the territory.	Agreement  A/RES, affirmed by subsequent S/RES.	temporary (8 months)  temporary
Panama ceded its right to exercise control over the Canal Zone to the United States (Treaty of Hay-Varilla, 18 November 1903) with Panama retaining titular title.	Treaty temporary	After the Basic Agreement was concluded between Croatia and local Croatian Serb authorities (12 November 1995), the SC set up UNTAES through S/RES/1037 (1996) to govern the region of Eastern Slavonia in a transition period (1995-98) before administrative control was handed back to Croatia.	Agreement, superceded by S/RES/1037 based on Ch. VII	temporary
Japan ceded the right to exercise legislative, judicial and administrative control over Okinawa to the United States (Peace Treaty between US and Japan, 8 September 1951) whereas residual sovereignty resided with Japan.	Treaty permanent	S/RES/1244 (10 June 1999) vested UNMIK with plenary authority over Kosovo while suspending yet in principle affirming the ‘territorial integrity of the FRY’.  Indonesia and Portugal agreed to transfer authority over East Timor to the UN (5 May 1999). S/RES/1246 established UNAMET to conduct the popular consultation. The question of titular sovereignty remains contested. The mandate of UNTAET (S/RES1272, 25 October 1999) went far beyond the initial agreement.	S/RES/ 1244 based on Ch. VII  S/RES/1272 based on Ch. VII	tempo- rary  temporary

# RÉSUMÉ: TOWARDS AN *IN REM* CHARACTERISATION OF INTERNATIONALISED TERRITORIES

This chapter employed a doctrine commonly referred to as object theory that traditionally conceived *imperium* as physical control over people and objects in a defined territory. By focusing on methodological questions, it was generally concerned with the 'unbundling' of sovereign rights and its implications for the question of exclusive *dominium* in a territorial order. We applied this *in rem* frame to analyse phenomena of residual sovereignty in international law. Indeed, we sought to integrate the methods utilised to restrict the panoply of sovereign rights and to divorce *imperium* from *dominium* into an evolving framework for the creation of an international territorial administration.

Our main objective was to emphasise that the technique of administering a territory under the auspices of an international authority and the concomitant curtailment of sovereign rights over territory is not a novel instrument of international diplomacy. The concept of internationalisation, whereby territories are put under international tutelage in order to create independent polities to balance the conflicting interests of competing states, had been a familiar notion over the past two centuries. Accordingly, states have chosen (through the medium of treaties) to agree to specific obligations barring the exercise of certain rights, while accepting the transfer of effective control to another subject of international law.<sup>155</sup> In some of the cases discussed, this claim was 'ceded' on a consensual basis by a horizontal agreement, through which a state or an international organisation acquired the right to exercise effective governmental control on the sovereign territory of the grantee. In more recent cases, the Security Council has appropriated effective control and transferred it to a UN subsidiary organ. We have, in any case, demonstrated that, although the residual sovereignty of the transferring state may be reduced to a *nudum jus* – a situation in which the sovereign emperor was indeed left without clothes – the titular claim to the exercise of power could very well be resuscitated by amending the transfer treaty or after its expiration. The retained bare title is, however, not a mere legal fiction. It may be resuscitated, as our analysis in Chapter V will demonstrate.

We further concluded that internationalised territories (as opposed to other types of territories with restricted sovereignty which were created by a bilateral agreement or settlement) rest on distinct *multilateral instruments* imposing obligations that may suspend the exercise of sovereign rights indefinitely. Those propositions, open-ended as they are, support the view that the United Nations may vertically suspend the right of exercise of sovereign powers and assume tasks of temporary government if, and to the extent that, such decisions serve the purpose of maintaining international peace and security.

Adopting an *in rem* perspective supplied an initial lens through which we are capable of observing permutations of, and limitations to, *dominium* in the context of internationalised territories. Phenomena of international *imperium* over territory are, however, more intricate to analyse than the straightforward analogies to Roman private law would suggest. Notwithstanding its heuristic fruitfulness, the application of concepts of *dominium* to instances of internationalisation cannot fully capture the key transformations in the internatio-

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<sup>155</sup> Allan James, 'The Concept of Sovereignty Revisited', in *Kosovo and the Challenge of Humanitarian Intervention. Selective Indignation, Collective Action, and International Citizenship*, (ed. by A. Schnabel and R. Thakur, Tokyo: UNU Press, 2000), at 337.

nal legal system that occurred with the Versailles Peace Settlement. The subsequent chapter thus supplies a second normative frame, namely one that locates political authority within a temporary fiduciary bond. Through the application of a framework of obligations, rather than one of *in rem* title, we may explain the emergence of a substantially different mode of *imperium* that the Mandate system heralded.

The next Chapter argues that the elevation of trust to an instrument of international government changed the international legal system to an extent that displaced both the property/legal sovereignty analogy in its institutionalised form along with the *dominium/imperium* dichotomy. One of the features that clearly distinguished the transfer of public authority to a Mandatory under the League system was the obligation of the latter to administer the territory in a 'benevolent' fashion, i.e., in the interest of the people governed, *without* proprietary interests. One of the conclusions of the following chapter will thus be that such 'benign administration' distinguishes internationalised territories (in which the United Nations possess *imperium*) from cases in which states agreed to transfer effective control under a protecting scheme, or under a demilitarisation or neutralisation agreement.<sup>156</sup>

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<sup>156</sup> Cf. Rudolf Geiger, *Die völkerrechtliche Beschränkung der Vertragsschlußfähigkeit von Staaten* (Berlin: Duncker&Humblot, 1979), at 141-2.



## CHAPTER II FIDUCIARY ADMINISTRATION: MANDATES, TRUST, AND THE TRANSITORY SOVEREIGNTY VACUUM

*'[I]f the essential basis of these rules, that is to say, territorial sovereignty, is lacking, either because the state is not yet fully formed or because it is undergoing transformation or dissolution, the situation is obscure and uncertain from a legal point of view and will not become clear until the period of development is completed and a definite new situation, which is normal in respect to territorial sovereignty, has been established.'*<sup>157</sup>

### INTRODUCTION: THE CHALLENGE TO PATRIMONIAL CONCEPTIONS OF SOVEREIGNTY

The Mandate system and the extent to which the notion of trust was operationalised for the governance of peripheral territories provides the framework – understood as a German *Rahmenerzählung* in which one story is told within a story – for this chapter which traces the curious events that led to the internationalisation of the territory once known as South-West Africa. It seeks to embed the narrative of Namibia's international administration in a 'fiduciary frame' that spanned the Mandate- and Trusteeship systems.

The analysis of the Mandate system, its transition to the UN Trusteeship system is a particularly rewarding task. The fascination stems from insights gained in appreciating the extent to which the normative repository of international law was accessed and while doing so, further developed and expanded, to enable a more effective response to anomalous situations. We will frame the developments by reference to the static-positivist conceptual framework (as applied in the preceding chapter), while pointing to the modernist assumptions underlying the departure of the sovereign at the periphery of the international system. It is the dichotomy, both its static and dynamic aspects, of international law, that thus informs this chapter's discussion of the fiduciary administration of dependent territories. We suggest that the powers and capacities, assumed by the League and later the United Nations to supervise the performance of the Mandatory and Trustee under the two related régimes, profoundly structured the international legal system to an extent that it would, at a later stage, generate the disposition, on the part of the international community, to endow the UN and other regional organisations with wide-ranging powers of territorial administration.

We will set the stage with a thorough re-appreciation of the two assumptions on which positivist jurisprudence has founded its theoretical system. Firstly, we discuss its *étatist* monism that considers the sovereign state as the basic site for the creation of international law. In this conception, only the state provided a clear, identifiable reality upon which a truly scientific analysis of international law could be grounded. The positivist insistence on sovereignty as the founding concept of the international system will naturally lead to a careful scrutiny of which entities could be regarded as 'sovereign'. A set of assumptions that broadly conceived of all land territory of the world as under the sovereignty of a certain state had undoubtedly the clear advantage of providing coherence and a uniform standard for interpreting treaties relating to territory. The static objective involved distinguishing proper

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<sup>157</sup> Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Åland Islands question, LNOJ Spec. Supp. 3 (1920), at 6.

sovereigns from other entities that appeared to possess attributes of sovereignty, such as pirates and nomads. Secondly, international legal positivism has sought to transpose legal concepts from the municipal to the international level in order to strengthen the coherence of law which virtually contains, and through a mere process of logical deduction will actually produce, all rules necessary for resolving all possible cases. The Roman law of *mandatum* and the common law instrument of trusteeship have thus been utilised as a framework for categorising an apparently new legal phenomenon that entered the international stage with the Paris Peace Conference. Our first – formalist – task will thus consist in tracing the advent of a new system of governance back to its fundamental conception as horizontal agreements bearing a strong resemblance to private law instruments.

The impact of the global legal transition in 1919, however, challenged the positivist foundation of sovereign obligation. Later in this chapter we demonstrate that the use of traditional legal instruments – conceived in the context of private law and applied on the international stage – led to the emergence of a set of new administrative techniques and a system of interlocking obligations. These gravitated around the concept of trust, which gradually superseded patrimonial notions of sovereignty to form a new temporary 'essential basis' in international law. Sovereignty, the basic element of the 'grammar of politics',<sup>158</sup> was temporary replaced by the syntax of trust. Grounded in principles of equity and morality and devoted to the furtherance of social goals, trust represented a new linkage between the occurrence in which sovereignty reposed in abeyance and the opportunities for emergent forms of legal creativity.

Our approach in this chapter will be to argue that the notions of fiduciary administration and trust came to fill the void left by the displacement of the sovereign at the periphery of the international system. The perennial dispute (briefly reviewed below) as to where sovereignty over 'C'-Mandates lay, between the mandatory Powers, the Principal Allies and Associated Powers, the League of Nations, or the inhabitants of the mandate territory, illustrates the deep rupture that had occurred with the development of the system of government by commission. With *Verzijl* we conclude that traditional categories of international law were "much too rigid to also cover the recent new formations...and that accordingly the time is more than ripe for a thorough revision of the traditional classification apparatus".<sup>159</sup>

As will be apparent later when discussing the General Assembly's termination in 1966 of the Mandate of South Africa over what is now called Namibia, the normative syntax of international law had been re-read by international jurists who adapted it to give effect to a more functional interpretation of the social purpose and objectives underlying the needs of international society. This development, which we will describe as a 'triumph of the teleologists', is important as it offers a preview of what has been called 'suspension of sovereignty' by an international authority – a capacity that was eventually adopted into the normative repertoire of the UN Security Council acting under Chapter VII. By the end of the twentieth century, international law would equip such authority with the power to 'pierce the veil' of the state system and its sovereign shield, guarded so jealously by international law, to reach the underlying sociological facts – something that *Morgenthau* might have forecast in

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<sup>158</sup> The expression is adopted from Harold Laski, *A Grammar of Politics* (London: Allen&Unwin, 1978).

<sup>159</sup> *Verzijl*, *International Law*, *supra* note 37, vol. II, at 519.

his fundamental critique of legal positivism delivered in 1940, when he suggested that "the intelligibility of any legal system depends on the recognition of such a set of fundamental ethical principles which constitute the ethical substance of the legal system, and shed their illuminating light upon each particular rule of law."<sup>160</sup>

Adopting the merits of a *Rahmenerzählung* means that the units within the individual case studies will be reassembled and repositioned to take on a different meaning at the level of the thesis as a whole. The inquiry into the normative framework that governed the establishment of the Mandate- and Trusteeship systems is therefore only a mere beginning for deriving further insights into, firstly, the position, in public international law, of non-state territorial entities temporarily governed by an international organisation, and, secondly, into the very legal nature of such an international administration. We argue that the solutions found in the case of the UN Council for Namibia were certainly novel and supported by a political will to undermine South Africa's residual standing in international relations. Yet these novel solutions raised further questions as to the representation of peoples caught at the crossroads between collective self-identification, foreign occupation, international tutelage and nominal independence. As we proceed, we will reposition these questions and adopt a more normative perspective in Chapter III and IV that builds on the occurrence of the phenomenon of the 'dual functions' of an international administration which acts both as territorial administrator and as representative of the organised community of states.

## 2.1 MANDATES AND THE DISPLACEMENT OF THE SOVEREIGN

*'Legal erudition will decide as to what extent it can apply to this institution the older juridical notions.'*<sup>161</sup>

WWI occasioned the triumph and decline of liberal nationalism as a new basis for international law. At its ideological apex, nationalism's claim to replace state power with national identity as the fundamental principle of European public order was regarded as particularly strong. The collapse of the imperial states under nationalist pressures had, however, not yet revealed a transparent new order based on 'nations'; on the contrary, the old order led to a murky situation marked by a tangle of national identities. At the centre of the European state system, a newly established international authority was charged with restructuring the nation state according to new, far-reaching principles that boldly defined the concept of population without reference to existing sovereign legal systems.<sup>162</sup> At its periphery, the ideological substratum that came to govern the exercise of international responsibility was that of trust – an essentially moral obligation, as President Wilson stated in 1918 when he suggested that "peoples and provinces are not to be bartered about from sovereignty to sovereignty as if

<sup>160</sup> Morgenthau, *Positivism*, *supra* note 28, at 268.

<sup>161</sup> 'Hymans Report', *The Obligations of the League of Nations Under the Terms of Article 22 of the Covenant (Mandates)*, adopted by the LON Council in its 8<sup>th</sup> Session (1 LNOJ 8, Title VII, of 5 August 1920, 334-341), at 339.

<sup>162</sup> See, e.g., the Advisory Opinion *Question Concerning the Acquisition of Polish Nationality*, PCIJ (Ser. B), No. 7 (1923), at 14-15. The Opinion is discussed by Berman in his remarkable 'Despair', *supra* note 79, at 1834-1842.

they were chattels and pawns in a game."<sup>163</sup>

This essentially new model of governance related to the powerful policy objective that *Wilson* had outlined in his programme for peace before a joint session of Congress in January 1917. In what would come to be known as the 'Fourteen Points' and 'Four Principles', he proposed an impartial adjustment of colonial claims according to the principle that in matters pertaining to sovereignty, "the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined".<sup>164</sup> As the former colonies lacked the capacity to assume the role of independent states in the short- and medium run, only international controlled governance remained to fill the vacuum in local government. General *Smuts*, whose major influence in the creation of the Mandate system is generally recognised, prepared the League for a strong role equivalent to that of sovereign state. In a pamphlet published in 1918, he suggested, concerning the territories of the defeated powers, that

[t]he League of Nations should be considered as the reversionary in the most general sense and as clothed with the right of *ultimate disposal* in accordance with certain fundamental principles. Reversion to the League should be substituted for any policy of national annexation... The degree of authority, control, or administration exercised by the mandatory state shall in each case be laid down by the League in a special act or charter, which shall reserve to it complete power of ultimate control and supervision, as well as the right of appeal to it from the territory or people affected against any gross breach of the mandate by the mandatory state.<sup>165</sup>

The idea that certain territories should be internationally administered had, of course, not been new. A system to protect dependent peoples from the machinations and rapacity of outsiders had already been proposed at the 1884 Congress of Berlin for the administration of the Congo.<sup>166</sup> *Wilson's* euphoric endorsement of various claims to self-determination was, however, not accompanied by sufficient confidence in the capacity of the newly founded League to *directly* bear the burden of administering post-colonial territories that had been earmarked for national self-determination.<sup>167</sup> *Smuts's* views, however, represented a radically

<sup>163</sup> *Wilson* quoted by Ramendra N. Chowdhuri, *International Mandates and Trusteeship Systems: A Comparative Study* (The Hague: M. Nijhoff, 1955), at 45.

<sup>164</sup> Woodrow Wilson, 'An Address to a Joint Session of Congress, January 8, 1918', in *The Papers of Woodrow Wilson*, vol. 45 (ed. by A.S. Link, Princeton, NJ: Princeton UP, 1984), at 534-39.

<sup>165</sup> Jan C. Smuts, *The League of Nations. A Practical Suggestion* (London: Hodder & Stoughton, 1918), at 19 (italics supplied).

<sup>166</sup> The Berlin 'General Act' of 26 February 1885 which provided for the neutralisation of the Congo basin, has been called the "first international treaty for the protection of native rights" in a dependent territory (cf. Chowdhuri, *Mandates*, *supra* note 163, at 20-21 and Wright, *Mandates*, *supra* note 27, 18-20). For a brief discussion of the 'Congo Free State' and the absence of an international machinery for ensuring the implementation of the Berlin Act see Francis B. Sayre, *Experiments in International Administration* (New York/London: Harper & Brothers, 1919), at 79-89 and Bain, *Anarchy*, *supra* note 18, at 68-74.

<sup>167</sup> *Wilson* seemed to have been eventually weaned away from the idea of giving the League ultimate title to the territories after consultations with French and British leaders in early 1919. For a general discussion of the Allied dispositions toward the Mandate system and in particular on General Smuts' role in structuring the debate on fiduciary administration prior to the adoption of the Covenant in April 1919 see Pittman B. Potter, 'Origin of the System of Mandates under the League of Nations', 16:4 *APSR* 563-83 (1922). On *Wilson's* concept of self-determination see, *inter alia*, Michla Pomerance, *Self-Determination in Law and Practice: The New Doctrine in the United Nations* (Boston: M. Nijhoff, 1982), at 1-7. For an examination of *Wilson's* understanding of national self-determination against the considerations of security, economics and diplomacy see

utopian departure from previous suggestions of 'benevolent administration'. It linked the notion of trust to a system of international governance operating on a global basis and anchored it in a machinery of accountability: "Europe is being liquidated, and the League of Nations must be the heir to this great estate."<sup>168</sup> In this political context, the Mandate system proved to be an intermediate device between competing claims for outright annexation of the territories renounced by the Central Powers on the one hand, and for plenary administration by an international body on the other.<sup>169</sup>

### 2.1.1 THE TRANSLATION OF POLITICAL CONTEXT INTO LEGAL RESPONSE

The Mandate system created the link between the agenda of state building and the granting of a continuously growing share in the territory's administration under the banner of self-determination, with a policy of gradual detachment that differentiated various levels of development. In the following sections, we suggest that the League instituted the Mandate system as a parenthesis within which trust substituted patrimonial notions of sovereignty over those territories whose populations were not yet prepared for the 'strenuous conditions of the modern world'.

#### (i) TRUST AND THE TRANSPOSITION OF MUNICIPAL LEGAL INSTRUMENTS

In their characterisation of trust, the drafters of Article 22 of the League's Covenant echoed the Spanish legal scholars and theologians of the sixteenth century, especially *Bartolomé de Las Casas* and *Franciscus de Vitoria*,<sup>170</sup> as well as *Edmund Burke* and his great parliamentary campaign in which he formulated the limitations of state power at the periphery of the empire, the fiduciary duties of a colonial power and the notion of accountability which the latter must be subject to.<sup>171</sup>

The notion of trust in which the legal instruments establishing the Mandates were grounded, derives its meaning precisely from the mission it is supposed to fulfil. In the English common law system, this mission invariably consists in ensuring that the *res* be matched to its aim by operation of the law. As *Brierly* pointed out, the underlying doctrine of trust was necessarily in conflict with the proprietary notion of title to a thing. The rights of a trustee are contingent upon his obligations; "they are tools given to him for the fulfilment of his duties, and such duties are determined by the appropriation to which the *res* has been devoted".<sup>172</sup> Trust, in

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Allen Lynch, 'Woodrow Wilson and the Principle of "National Self-Determination": A Reconsideration', 28 *Review of International Studies* 419 (2000).

<sup>168</sup> Smuts quoted by David H. Miller, 'The Origin of the Mandate System', 6 *Foreign Affairs* 277-289 (January 1928), at 281.

<sup>169</sup> As the Director of the Mandates Section of the LON told the Mandates Commission at its first meeting, "[t]he Mandatory system formed a kind of compromise between the position of the advocates of annexation, and the proposition put forward by those who wished to entrust the colonial territories to an international administration" (quoted by Quincy Wright, 'Sovereignty of the Mandates', 17 *AJIL* 691-703 (1923), at 691).

<sup>170</sup> Cf. James Brown Scott, *The Spanish Origin of International Law. Francisco de Vitoria and his Law of Nations* (Oxford: Clarendon Press, 1934); J.H. Parry, *The Spanish Theory of Empire in the Sixteenth Century* (Cambridge: CUP, 1940); and C. Castañón, 'Les problèmes coloniaux et les classiques espagnols du droit des gens', 86 *RCADI* (1954-II), at 557.

<sup>171</sup> Cf., e.g., his speech in the House of Commons on Fox's India Bill of 1783, *supra* note 12.

<sup>172</sup> 'Trust and Mandates', 10 *BYIL* 217-219 (1929), at 218. See also Wright, 'Sovereignty', *supra* note 169, at 695 and Buckland/McNair, *Roman Law*, *supra* note 53, at 307. *et seq.* For the *fidei-commissum* as the precursor to the common law trust cf., e.g., David Johnston, *The Roman Law*

Brierly's understanding, thus involves a segregation of assets from the *patrimonium* of individuals, and a devotion of such assets to a certain function. In what seemed to be an extension of *de Vitoria's* extraordinarily potent metaphor of wardship over infants, *McNair* compared the Mandate system with the English common law trust, according to which power can be transferred to a trustee for the benefit of a "minor or a lunatic" who cannot manage her own affairs while supervisory authority is vested in a court.<sup>173</sup> To *McNair*, the abeyance of sovereignty was analogous to the common law institution of trust, "whereby the property (and sometimes the persons) of those who are not *sui juris*...can be entrusted to some responsible person as a trustee or *tuteur* or *curateur*."<sup>174</sup>

Among the principles central to such institution is that the trustee "is not in the position of the normal complete owner" but he must still "carry out...the mission confided to him for the benefit of some other person". The trustee "is precluded from administering the property for his own personal benefit".<sup>175</sup> On the contrary, the Mandate was an institution to be notionally contrasted with ownership, since it did not share any of the three elements of the latter, *usus*, *fructus*, and *abusus*. The *right* to exercise effective control held by the Mandatory power, or the Trustee, found its sole justification in his duty to perform the trust in a certain fashion, and to achieve the work assigned to him. This seemed to have been the approach taken by *McNair* who opined that in the absence of sovereignty, the focus shifts to the "rights and duties of the Mandatory" as defined in "international agreements creating the system and the rules of law they attract".<sup>176</sup>

Transposed to the international normative space, fiduciary administration meant to bind the Mandatory in a two-fold system of obligations. On the one hand, the state vested with public authority in the mandated territories exercised its powers *by commission* from another entity, the League of Nations. Hence, Mandatories had to report to the Permanent Mandates Commission (PMC), the monitoring organ established to "receive and examine the annual reports of the Mandatories, and to advise the Council on all matters relating to the observance of the mandates".<sup>177</sup> Administering the 'sacred trust of civilisation' vested in him, the Mandatory, by accepting a mandate, assumed an obligation of *binding legal character*

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of Trust (Oxford: OUP, 1988). See also Avisheh Avini, 'The Origin of the Modern English Trust Revisited', 70 *Tulane LR* 1139 (1995-1996) and Thomas B. Lehman, 'Trust: A Common-Law Institution in a Civilian Context', 8 *Tulane European and Civil Law Forum* 53 (2003).

<sup>173</sup> Judge McNair, *Advisory Opinion on the International Status of South-West Africa*, ICJ Reports [1950] 128, at 150.

<sup>174</sup> *Ibid.*, at 149 (emphasis added). International law's image of the child-like native was, of course, later rejected by the decolonisation movement which opened the door to a more participatory structure of the trust. This powerful metaphor will, however, reappear and be critically reflected upon throughout the thesis

<sup>175</sup> *Ibid.*, at 149. Similar: Ernst G. Mohr, *Die Frage der Souveränität in den Mandatsgebieten* (Leipzig: Universitätsverlag R. Noske, 1928), at 19-20.

<sup>176</sup> McNair, *supra* note 173, at 150.

<sup>177</sup> Article 22(9) of the Covenant. For the scope and powers of the PMC cf. Duncan H. Hall, *Mandates, Dependencies and Trusteeships* (London: Stevens & Sons Ltd. for the Carnegie Endowment for International Peace, 1948), at 177-212. The Mandate system arguably failed to provide any formal mechanism by which the 'natives' could correspond meaningfully with, and be represented, before the PMC. The Commission was also unable to check abuses of the system by the Mandatory powers themselves. See Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations', 34 *NYUJILP* 513-633 (2002), at 604-605.

towards the international community.<sup>178</sup> As a corollary of that trust, "securities for its performance were instituted in the form of legal accountability for its discharge and fulfilment".<sup>179</sup> On the other hand, the Mandatory was conceived as acting *for the benefit* of a third entity, namely the territory and people concerned. In this context, *Makowski* drew a sharp distinction between the legal bond linking the Mandatory and the mandated territory and the relationship between the Mandatory and the native population.<sup>180</sup> According to him, the former bond would be a 'real' relationship in which the Mandatory is the only *ayant-droit*, whereas the second would be a 'personal' one, the content of which was determined by the League, showing affinity with the legal relationship flowing from the Minority Treaties.<sup>181</sup> This two-fold system of obligation, instituted for the first time through Article 22 of the League Covenant, can be seen as at the source of what some authors have termed the 'dual functionality' of international territorial administrations.<sup>182</sup>

In any case, the Mandate framework classified Mandate territories according to their 'degree of advancement' and attached differing legal identities to them. The limited international personality of 'A'-Mandate – those entities formerly belonging to the Ottoman Empire – was recognised in Article 22(3) of the Covenant.<sup>183</sup> These territories clearly fell within the category of not yet fully sovereign subjects of international law, vested as such with territorial supremacy over the area included within their borders. On the international plane, France and Great Britain, the powers mandated to administer the three entities in the Middle East, acted *on behalf* of the mandated territory in its capacity as a separate legal entity in a manner that was compared to a relationship of a suzerain state with regard to his vassal.<sup>184</sup> Analysing the Mandates for Syria and Lebanon as approved by the Council and the treaty between Great Britain and Iraq, *Corbett* found that the position of the Mandatory was closely analogous to that of a state exercising a protectorate, contemplated, as they were, on a temporary basis.<sup>185</sup> As *Berman* plainly asserts, "if the general Mandate system was a half-way house between colonisation and self-determination, the 'A' Mandates... constituted a halfway house between the Mandate system itself and self-determination".<sup>186</sup> The situation was different with regard to Mandate 'B' territories, established under Article 22(5) over peoples, particularly in Central Africa, whose actual stage of development was still too

<sup>178</sup> Cf. the first 'Hymans Report' which specified that the Mandatory Powers must be invested with the necessary powers "by means of a legal instrument which will legally bind them" (*supra* note 161, at 335).

<sup>179</sup> ICJ Reports 1950, *supra* note 173, at 29.

<sup>180</sup> M. Makowski, 'La doctrine juridique des mandats B et C', 40 *RGDIP* (1933), at 374 *et seq.*

<sup>181</sup> Roche established a similar bi-fold obligation of the Trustee towards, first, the population whose development he is to further, and second, towards the territory whose integrity is to be protected ('La souveraineté dans les territoire sous tutelle', 58 *RGDIP* 399-437 (1954), at 416 *et seq.*).

<sup>182</sup> See Chapter IV.2.1, *infra* p. 130.

<sup>183</sup> Palestine/Transjordan, Syria/Lebanon, and Iraq (Mesopotamia) had, in the terms of Art. 22(4), reached a stage of development where their existence as independent nations could be provisionally recognised "subject to the rendering of administrative advice and assistance by a Mandatory until such time as they (were) able to stand alone". For a discussion of the peculiar position of Iraq cf. Arnold McNair, 'Mandates', 3:2 *Cambridge LJ* 149-160 (1925), at 153-154, note 4.

<sup>184</sup> Verzijl, *International Law*, *supra* note 37, at 546.

<sup>185</sup> Corbett, 'League', *supra* note 78, at 130. For a comparison of the Mandatory's public international function to a protectorate cf. Georges A.J. Scelle, *Manuel de droit international public* (Paris: Domat-Montchrestien, 1948), at 223. For the (limited) legal personality of Mandate territories see Chapter III.2.1, *infra* p. 109.

<sup>186</sup> Nathaniel Berman, 'Between "Alliance" and "Localization": Nationalism and the New Oscillationism', 26 *NYUJILP* 449-491 (1993-1994), at 478.

'backward' to allow them 'to stand by themselves', and 'C' Mandates, such as South-West Africa and certain South-Pacific islands, which pursuant to Article 22(6) could for some other reason be best administered under the laws of the Mandatory as integral portions of their territory. Regarding these two latter categories, it has been found impossible to determine who held the title to territorial sovereignty.

## 2.1.2 THE MANDATE SYSTEM AS A NETWORK OF INTERLOCKING OBLIGATIONS

Having briefly described the Mandate framework as it was established in the post-war political context, we further expounded upon it by analysing the municipal origin of the legal tools that international lawyers used to build this framework. The aim of the following section is to demonstrate that a 'snapshot of sovereignty', taken through a positivist lens, fails to account for the temporary shift of paradigm contained in the parenthesis of anomalous situations, namely an obligations-based framework of fiduciary authority. *Verzijl* has captured the essence of the difficulties which positivists faced when trying to determine the seat of territorial sovereignty: "With regard to the legal situation in which different manifestations of public power over one and the same territory are apportioned among different authorities, the whole quest for the 'the' territorial sovereignty loses much of its usual meaning, or becomes senseless."<sup>187</sup> The following section is specifically concerned with demonstrating that a static analysis of the interlocking legal instruments establishing the Mandate system and its attempts to facilitate a categorisation of anomalous situations cannot fully capture the temporary shift in the essential basis of international law at which *Verzijl* hinted.

### (i) FORMAL CATEGORISATION OF LEGAL INSTRUMENTS UTILISED

The Mandate system can be disaggregated into four discrete legal instruments:

- First, the traditional *horizontal agreements* among victorious powers which carved up the remnants of two empires and preliminarily assigned them to the Mandatory powers.
- Second, the *renunciation of title and effective control* by the old sovereign, to the Principal Allied and Associated Powers – Great Britain, France, Italy, Japan and the United States (hereinafter PAA Powers).
- Third, by setting up the League of Nations, the PAA Powers *ceded the right to supervise* the exercise of effective control to the multilateral body.
- The Mandate which in itself represented a *tripartite treaty* binding all parties to a single policy objective, the administration of territory under the concept of the 'sacred trust of civilisation'.

The first set of instruments allocated territories as 'mandates' to states which had already occupied them.<sup>188</sup> The next legal step in this chronology was the highly significant renuncia-

<sup>187</sup> J.H.W. Verzijl, 'International Court of Justice: South West Africa and Northern Cameroons Cases (Preliminary Objections)', 9 *Nederlands TIR* 1-33 (1964), at 15. The difficulties of transposing private law conceptions into the realm of international mandates were synthesised by Lauterpacht in his *Private Law Sources*, *supra* note 49, 191-202.

<sup>188</sup> Individual 'C' Mandates for the former German colonies were allocated to the Mandatories by the PAAP Supreme Council on 7 May 1919 which would have presumably not have had any legal



tion of territorial sovereignty and effective control by the Central Powers, to the grantees, the PAA Powers.<sup>189</sup> International law appears to have undergone a deep rupture at this point. Through the vehicle of horizontal agreements between the victorious and the Central Powers, the latter's sovereign rights, as *jura in rem*, or real rights in a proprietary sense, had been renounced in favour of a party from whose hands they seemed to have disappeared. With regard to 'C' Mandates, the search for the sovereign ceases here and the notion of territorial title is not to appear again.

The next legally significant instrument to be considered is the creation of the League, and the cession of the PAA Powers' *right to supervise the exercise of effective control* (understood as the power to confirm a Mandatory who would exercise effective control on its behalf) over the territories to the League. This cession is implicitly contained in Article 22 of the Covenant. According to the Vice-President of the Permanent Mandates Commission, sovereignty over Germany's overseas possessions has passed to the PAA Powers, while "the right of supervision appertaining to these Powers as grantors of the mandates has automatically passed to the League of Nations."<sup>190</sup>

Finally, we need to consider the Mandate instrument itself, which was limited in time and concluded between a plurality of persons, constituting a complex web of interlocking obligations. In brief, the relevant Allied Power authorised the Mandatory to exercise effective control with the consent of the League Council, the Mandant. The authorisation itself was comprised of a 'chain of title'<sup>191</sup> – three separate agreements, categorised by the ICJ in the 1962 *South West Africa (Preliminary Objections)* case.<sup>192</sup> Firstly, it incorporated an agreement of the definite acceptance of the Mandate by the Mandatory in accordance with Art. 22(2) of the Covenant ('willing to accept them') through which the aggregate of public competencies respective to the territory and its inhabitants – the totality of state competencies in-

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effect at least until the Treaty of Versailles came into force on 10 January 1920, since *nemo dat quod non habet*. See Geoffrey Marston, 'Termination of Trusteeship', 18 *ICLQ* 1-40 (1969), at 35. The Turkish territories were allocated at San Remo on 25 April 1920. By this latter date the United States had withdrawn from official participation in the Supreme Council. The concrete terms of the C-Mandates were later defined by the League Council on 17 December 1920.

<sup>189</sup> By Article 119 of the Treaty of Versailles, 1919, Germany renounced 'all rights and titles' over its overseas possessions. By Article 16 of the Treaty of Lausanne, of 24 July 1923, Turkey renounced 'all rights and title whatsoever' over its overseas possessions. The issue of whether or not the PAA Powers thereby acquired territorial sovereignty, either individually or collectively, has been the subject of a fierce debate (see *infra*). Even before the Versailles Treaty was signed, there had been a vigorous dispute among the victorious PAA Powers, particularly between those who favoured outright annexation and those such as President Wilson who favoured the Mandate-based administration. The Mandate provisions were eventually written into the draft Covenant which was published on 14 February 1919 and came into force on 10 January 1920, the same day the treaty of Versailles did. The 'C' Mandates, however, were only confirmed by the League Council on 17 December 1920. It has been argued that there was no period in time during which the PAA Powers could have held the territories *à titre de souverain*. See Marston, 'Termination', *supra* note 188, at 35.

<sup>190</sup> PMC, LN Doc. A19 (Annexes) Vol. VI (1923), at 222 (quoted by Corbett, 'League', *supra* note 78, at 133).

<sup>191</sup> ICJ Reports 1950, *supra* note 173, at 393.

<sup>192</sup> In this case, the question arose whether the Mandate was indeed a treaty or convention in force within the meaning of Article 37 of the Statute. The judgement stated that "[t]he Mandate, in fact and in law, is an international agreement having the character of a treaty or convention" (*Ethiopia v. South Africa; Liberia v. South Africa*, ICJ Reports [1962] 319, at 330). Judges Spender and Fitzmaurice (at 490) argued that it was a "delegation promulgated by a resolution of the Council of the League".

herent to the concept of territorial sovereignty – was transferred. Secondly, it confirmed the commitment of the PAA Powers to propose the terms of the Mandate to the League Council. Thirdly, it contained a confirmation agreement by the Council that the terms of the Mandate proposed to it had been accepted and agreed to by the Mandatory and the Council. The Mandate agreement was thus conditional upon the consent of the League's Council (representing the League and its Members) which implied that effective control was to be exercised on its behalf, with the latter retaining the capacity to loosely supervise performance of this trust.

The tripartite nature of this international treaty instituted a novel international regime to which the League itself, represented by its Council, became party. Its tripartite nature was further strengthened by the provision that the Mandatory had no right to annex, cede, or otherwise dispose of the mandated territory without the consent of the Council. Within the proposed framework, it meant that, while the right to exercise effective control was to be transferred to the Mandatory, the right to supervise its conduct remained with the League. By defining the method through which the *mandate-tutelle* was to be exercised, the tripartite agreements functioned as the implementing instrument of Article 22 of the Covenant.

We can preliminarily conclude that a formal categorisation of the legal technique of transferring effective control over 'C'-Mandates involved the application of four interlocking instruments that, although lacking a *synallagma*, created 'objective' obligations which would maintain their binding character even in case of a fundamental breach by one party: "[t]he obligation of each party was altogether independent of performance by any of the others".<sup>193</sup> While the right to exercise effective control remained with the Allies, titular sovereignty seemed to have been suspended to give way to a more fluid arrangement, a system of institutional restraint structured by reciprocal international obligations and accountability. In short, the Mandate System represented an international regulatory regime which viewed the authority of international law over people and territory as a *substitute* for sovereignty.<sup>194</sup>

## (II) SUPREMA POTESTAS WITHIN THE MANDATE SYSTEM?

As we discuss the instruments through which supreme governmental power was transferred from the Central powers to the Mandatories, it is clearly unsurprising that the sovereignty issue continued to puzzle inter-war jurists. As traditional doctrine had limited its efforts to "schematically transplanting time-honoured common and Roman law principles of interpretation to the international field",<sup>195</sup> jurists began to scrutinise the novel Mandate instrument

<sup>193</sup> Gerald Fitzmaurice, *YILC* (1958-II), at 44. Cf. also Christopher Kienle, 'Der völkerrechtliche Status Südwestafrikas/Namibias', 63 *Friedenswarte* 68-92 (1980), at 79 *et seq.* Similarly, Trusteeship agreements possessed a dispositive (conveyancing) as well as a contractual character and constituted a quasi-statutory basis for the Trusteeship system. See Clive Parry, 'The Legal Nature of Trusteeship Agreements', 27 *BYIL* 164-185 (1950), at 185, as well as the discussion of 'dispositive' treaties *infra*, p. 65.

<sup>194</sup> D. Campbell Lee was one of the first commentators who advanced the concept of suspended sovereignty in case of the Mandate system: "I suggest that the sovereignty of a Mandated area is in suspense pending the creation of a new State, pending the time, when the people is able to stand alone... Full sovereignty will come in due time to the territory, but only when its people assume the dignity of an independent State" ('The Mandate for Mesopotamia and the Principle of Trusteeship in English Law', Lecture delivered under the Cecil Rhodes Benefaction at University College (London University, 23 May 1921), quoted by Mohr, *Souveränität*, *supra* note 175, at 49).

<sup>195</sup> Morgenthau, 'Positivism', *supra* note 28, at 281.

from the perspective of potential holders of the title to territory. Possible candidates included the League of Nations, the Allies, the Mandatory powers, and the mandated territory itself, which was characterised as possessing 'latent sovereignty' that would constitute itself upon the termination of the mandate.<sup>196</sup>

The PAA Powers (either collectively as condominium, or individually) appeared to be a promising first candidate. The central powers lost their titles to their overseas territories as result of the peace settlements. Moreover, they allocated the territories to be placed under the Mandate to the Mandatory powers. The capacity to designate the Mandatory power can be interpreted as part of the notion of sovereignty that has always included the power to dispose of territory, and to cede effective control over territory to a third entity. A discussion of the title to territory according to patrimonial notions of ownership under Roman private law would, however, point to the absence of *animus* on the part of the Allies to actually assume sovereignty over the territories.<sup>197</sup> While the *justa causa* for the transfer of possession obviously lay in the various renunciation treaties, and *corpus possessionis* (physical possession or, in the analogous figure of international law, the external criterion of effective control) was arguably maintained by the Mandatory on behalf of the PAA Powers, the latter clearly lacked the *intention to act as sovereign*.<sup>198</sup>

The only point of unanimous agreement in what was once a highly controversial legal debate was that the title would not reside with the Mandatory powers. Although Article 22 of the Covenant provided that territories of the 'C' Mandate category "could best be administered under the laws of the Mandatory as integral portions of its territory", the clear view of the organs of the League – the Permanent Mandates Commission and the Council – was that

<sup>196</sup> Antony Anghie, "The Heart of My Home:" Colonialism, Environmental Damage, and the Nauru Case', 34:2 *Harvard ILJ* 445-506 (1993), at 466. No attempt is made here to cite the extensive literature on this subject. For three illuminating reviews of several theories of sovereignty over mandated territories, see Mohr, *Souveränität*, *supra* note 175; Wright, *Mandates*, *supra* note 27, at 319-338; Francis B. Sayre, 'Legal Problems Arising from the United Nations Trusteeship System', 42 *AJIL* 263-298 (1948), at 268-72.

<sup>197</sup> The figure of *animus* was re-employed by the PCIJ in the *Legal Status of East Greenland* case in which it pointed out that sovereignty required "intention and will to act as a sovereign and some exercise of such authority" (*Denmark v. Norway*), Judgment, PCIJ (Ser. A/B), No. 53 (1933), at 46). As Koskenniemi notes, the Court's express distinction between the aspects of *animus/corpus possessionis* in this case was aimed the reconciliation of the two concepts. On the one hand, the State's own self-interpretation (*animus*) had to be effective and materialise on the territory concerned. On the other had to exist an external criterion (*corpus*) to control such self-interpretation (*From Apology to Utopia. The Structure of International Legal Argument* (Helsinki: Finnish Lawyers' Publishing Co., 1989), at 249).

<sup>198</sup> Cf. J. Stoyanovsky, *La théorie générale des mandats internationaux* (Paris: Les Presses Universitaires, 1925), at 69. This question re-appeared with the advent of the Trusteeship system and the agreements made under it. The majority of Trusteeship agreements stipulated that territories should be administered as an 'integral part' of the administering state. Oppenheim quotes the French and Belgian delegates to the UN GA who stated that it was the intention of their governments that the words 'as integral part' were necessary as a matter of administrative convenience. The British delegate stated that the retention of this phrase in the Trusteeship agreement for Togoland and the British Cameroons "did not involve administration as an integral part of the United Kingdom itself and did not imply British sovereignty in these areas" (GA Doc. A/258, 12 December 1946, quoted in Oppenheim, *International Law*, vol. I, 8<sup>th</sup> ed., *supra* note 64, at 238 note 2). In an explanatory comment on the draft Trusteeship agreement for the former Japanese mandated areas in which the phrase 'integral part' appeared, the US declared that this did not "imply sovereignty over the territory" (Sayre, 'Legal Problems', *supra* note 196, at 271, note 22).

sovereignty did not reside with the Mandatory powers.<sup>199</sup> Mandatories could not have obtained the title from the PAA Powers since they themselves lacked it and *nemo plus iuris (ad alium) transferre potest, quam ipse habet*. This position has also been subscribed to, in the strongest language possible, by the ICJ when it established that "[t]he terms of this Mandate, as well as the provisions of Article 22 of the Covenant and the principles embodied therein, show that the creation of this new international institution did not involve any cession of territory or transfer of sovereignty" to the Mandatory.<sup>200</sup>

Was, after all, the League vested with the sovereign title to any of the mandated territories? Those supporting this view<sup>201</sup> relied on the clause in the preamble of the respective mandate agreements which referred to its exercise by the Mandatory power 'on behalf of the League'. Yet not only would the *justa causa* have lacked in this regard, even the *animus* to possess territory would have been very difficult to establish. Although the League had the task of supervising the performance of the trust, it was certainly not meant to exercise aspects of sovereignty over the mandated territories, if we understand sovereignty in a static analogy of Roman private law that includes the right of the possessor to dispose of the territory. Similar difficulties have been encountered positing "the people" of the mandated territory as holders of ultimate political authority. While such understanding might be more plausibly applied to the 'A' mandates, defined by Article 22 as having "reached a stage of development where their existence as independent nations may be provisionally recognised subject to the rendering of administrative advice and assistance by a mandatory until such time as they are able to stand by themselves", it was inapplicable to the 'B' and 'C' mandates.<sup>202</sup>

### (III) THE APPLICATION OF A 'MATRIX OF MODERNISM'

In hindsight, the idea of suspending sovereignty in the case of the Mandate system served as the legal rationalisation of political realities. As *Brownlie* aptly demonstrates, the Mandate system did not emerge solely as a result of a legal appreciation of the local population's capacity for self-rule, but rested on the power of disposition of the principal powers, the leading victor states of WWI, over the colonial territories of the defeated powers.<sup>203</sup> A power

<sup>199</sup> Cf. Chowdhuri, *Mandates*, *supra* note 163, at 90-91 as well as Wright, *Mandates*, *supra* note 27, at 446-47 and the League documents there cited.

<sup>200</sup> ICJ Reports 1950, *supra* note 173, at 132. By way of qualification, it should be noted that the question of locating *suprema potestas* entailed a range of concrete legal problems. In the notable case *Rex v. Jacobus Christian* ([1924], 12 *Ann. Dig.*), the Appellate Division of the Supreme Court of South Africa had to decide whether the offence of high treason could be committed with respect to a Mandatory Power or whether there could be no *crimen majestatis* where the authority concerned had no *majestas*. The judgement concluded that the limitations upon the exercise of authority of the Mandatory are not inconsistent with the possession, by the Mandatory, of *majestas* within its territory on which a charge of high treason can be founded. Cf. the discussion of the case in E.L. Matthews, 'International Status of Mandatory of League of Nations. High Treason Against Mandatory Authority', 6 *Journal of Comparative Legislation and IL* 245-50 (1924).

<sup>201</sup> See authorities cited in Oppenheim, *International Law*, vol. I, 8<sup>th</sup> ed., *supra* note 198, 222 note 5.

<sup>202</sup> Sayre, 'Legal Problems', *supra* note 196, at 270. That sovereignty in the Mandate system rested with the 'people' under tutelage was the conclusion of, *inter alia*, Paul Pic ('Le régime du mandat d'après le traité de Versailles', 30 *RGDIP* 321 (1923), at 334) and Albrecht Mendelssohn-Bartholdy, who noted that "[d]ie Idee des Mandates ist es, daß nicht der Mandatar Souverän ist, sondern das Volk des Mandatsgebietes" ('Die Afrikanischen Mandate', *Mitteilungen der Deutschen Gesellschaft für Völkerrecht* 70 (1925), at 74).

<sup>203</sup> Brownlie, *Principles*, 4<sup>th</sup> ed., *supra* note 45, at 172. Wright was equally realistic when he wrote that the system was not a "product of disinterested juristic thought nor of detached scientific

of disposition, one might add, that sought to be restrained by notions of trust in an asymmetrical relationship posited in modern opposition to territorial conquest and annexation. As *Bain* observes, members of European state society internationalised the idea of trusteeship by establishing international legal obligations that explicitly repudiated relations based on domination and exploitation.<sup>204</sup> There appeared to be common agreement among the PAA Powers that the division of territories taken from Germany and Turkey would contradict what had been concluded regarding the iniquity of conquest, while an attempt to permanently divide the spoils would have provided too great an opportunity for conflict among the Allies themselves.

The ambivalent relationship between title and obligations that emerged after WWI can, however, not be solved through mere political contextualisation. As *Kennedy* has demonstrated with great insight, the Versailles settlement represented a "move from war to peace as the capture of an unruly politics by law".<sup>205</sup> The challenge at the Paris Peace Conference consisted in the reconciliation of novel visions about a people's self-determination with the static framework of international law, propelled by an enduring sense of legalism which had survived the shock of WWI. Those inter-war jurists who tried to capture the phenomenon of suspended sovereignty through the prism of a '*titre souverain*' had not yet fully appreciated the change of paradigm that occurred with the operationalisation of trust in the framework of the Mandate system. The question of exactly where sovereignty over mandate territories lay must have appeared sterile and static to jurists such as *Brierly* who ridiculed the idle attempts undertaken by Continental lawyers to force the mandate into the "individualistic concept of sovereignty, as it is to force the trust into a scheme based only on private property".<sup>206</sup>

The attempts to account for the developments of the interwar period produced on the other hand more nuanced and sophisticated versions of sovereignty doctrine.<sup>207</sup> Constraints of the stable legal order grounded in sovereignty were rejected in favour of international legal 'matrix of modernism' – the experimental exploration of legal techniques enshrined in the post-war settlement which provided, as a starting point, for plebiscites to determine the fate of disputed border areas and, further, the provision of special regimes designed to protect ethnic groups too small or dispersed to be eligible for such plebiscites.<sup>208</sup> These novel tools were adopted under the rubric of 'self-determination' and embodied a heightened belief in the power of disposition, appropriated by the international community, to define the verifiable bearers ('peoples') of a right and the concomitant duties owed by other parties (states).

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investigation but was a compromise invented by the Versailles statesmen to meet an immediate political dilemma" (*Mandates*, *supra* note 27, at 3).

<sup>204</sup> *Bain*, *Anarchy*, *supra* note 18, at 53.

<sup>205</sup> David Kennedy, 'The Move to Institutions', 8 *Cardozo LR* 841-988 (1987), at 841.

<sup>206</sup> *Brierly*, 'Trust and Mandates', *supra* note 172, at 219.

<sup>207</sup> Cf. *Anghie*, 'Birth', *supra* note 177, at 535-544. For the characteristics of the 'high modernist cultural renewal' and its force of experimentation in the sphere of jurisprudence see also *Nathaniel Berman*, 'Modernism, Nationalism, and the Rhetoric of Reconstruction', 4 *Yale Journal of Law and Humanities* 351-380 (1992), at 362 *et seq.*

<sup>208</sup> For the post-war plebiscites cf. *Anthony Whelan*, 'Wilsonian Self-Determination and the Versailles Settlement', 43 *ICLQ* 99-115 (1994), at 101 *et seq.* Answering the criticism that 'self-determination' was extended only to vanquished territories, he argues convincingly that such 'right' was, in the context of the Versailles settlement, understood rather as a maxim, or criterion, which guided the exercise of discretionary power without dictating its outcome (at 108-109).

These instruments aimed at nothing less but the concretisation of an underlying communal 'self' in a moment of *'carence de souveraineté'*. Such legal experimentation reached its most radically modern force with the creation of various new legal techniques, in theory and doctrine, culminating in the governance of territory by local, yet international institutions. Each inter-war experiment in legislative creativity, which we have briefly discussed in the preceding chapter, contributed to an international legal version of complex modernist innovation: direct international government in the Saar; a novel independent entity in Danzig; the supranational integration in Upper Silesia.<sup>209</sup> Innovative ideas similarly guided the plans to 'internationalise' Fiume/Rijeka under the League's *'souveraineté absolue'*.<sup>210</sup>

Interwar jurists had successfully addressed the problem of sovereignty by dislodging its foundational significance for international law. Yet, as we will see in the course of the next section, the question of locating the sovereign site remained unanswered. It would re-visit the United Nations in subsequent intervals, beginning in 1949, when the old idea of flying a League of Nations flag side by side with the national flag of the administering power on the mandated territory was revived in the context of the establishment of the new Trusteeship system.<sup>211</sup> Beyond the merely symbolic, the issue garnered renewed significance as international lawyers struggled with the doctrinal minefield laid by the termination of South Africa's mandate for the administration of South-West Africa, and the subsequent issues surrounding the capacity of the United Nations to assume supreme authority after such termination. Indeed, the new essential basis stemming from transitionally interlocking obligations proved to be a mere interval in the operation of the positivist paradigm, as a new sovereign, embodied by the 'peoples' and their legitimate claims to self-determination, was fated to return.

<sup>209</sup> The excitement with new models of international governance is palpable in Sayre's *Experiments*, *supra* note 166. His account, written in the wake of the Paris Peace Conference, draws lessons from the failures of international organs with limited territorial competencies such as the Cape Sparteil Lighthouse (1865) and the Suez Canal Commission (1888). For two comprehensive studies on inter-war experimentalism with international administration see Beck, *Internationalisierung*, *supra* note 82, as well as Ydit, *Internationalised Territories*, *supra* note 37. Cf. also Whomersley, 'Gdansk', *supra* note 72, at 919 *et seq.*; Münch, 'Saar', *supra* note 74, at 271, and Hannum, *Autonomy*, *supra* note 78, at 389 *et seq.*

<sup>210</sup> British – American – French Memorandum of 9 December 1919, quoted by Beck, *Internationalisierung*, *supra* note 82, at 28.

<sup>211</sup> After a lengthy discussion, the Forth Assembly adopted A/RES/325 (IV) on 15 November 1949 which requested the Trusteeship Council to recommend to the Administering Authorities that the flag of the UN be flown over all Trust Territories side by side with the local flag as a visibly symbol of the ideals and aspirations proclaimed by the Charter. For background to the flag issue cf. George Thullen, *Problems of the Trusteeship System. A Study of Political Behaviour in the United Nations* (PhD Thesis no. 159, Institut Universitaire de Hautes Études Internationales, Geneva, 1964), at 91-94.

## 2.2 'LE ROI EST MORT, VIVE LE ROI!': THE TRUSTESHIP SYSTEM AND THE RETURN OF THE SOVEREIGN

*'The choice bequeathed by the interwar period is not between 'experiment' and 'tradition', but between different kinds of 'experiments.'*<sup>212</sup>

The Mandate system, although limited in its territorial application, gave practical expression to the concept of international concern for dependent peoples through which "all members of the organisation are jointly and severally responsible for the fulfilment of the sacred trust".<sup>213</sup> The regime regulating the fiduciary administration of territory was, of course, a consequence of an appreciation of the manifestly unequal balance of power between the parties concerned. The reconfiguration of rights and responsibilities of a state power exercised over dependent peoples represented the recognition of a relationship in which one party operates with formal authority over another, less powerful party.<sup>214</sup> In the absence of local capacity to govern and represent territory, trust temporarily operationalised an asymmetrical relationship that would work parallel to, and beyond, the sovereign equality of states. Under the modernist prism, such recognition was, as *Berman* points out, facilitated by the convergence of two streams of contemporary thought: the infra-state level, nationalism, was viewed as being in an alliance with the supra-state level, the modernist faith in cutting-edge internationalism and its array of novel legal techniques – allies against the power of the state, the cornerstone of late 19<sup>th</sup> century positivism.<sup>215</sup>

As a consequence of a successful challenge that nationalism had mounted against nineteenth-century static positivist doctrine, the League affirmed that the well-being of subject peoples constituted a legitimate subject of international scrutiny. The principle of nationalities, implemented in the European centre, came to occupy the role of a zodiac sign<sup>216</sup> of the period that also marked the departure of the sovereign at its periphery and the creation of a mechanism to ensure the faithful performance of trusteeship obligations. Framing the debate in terms of rights and duties of the Mandatory, rather than in patrimonial notions of ownership, *McNair* famously stated in his separate opinion in the 1950 *South-West Africa* case that

<sup>212</sup> Berman, 'Alliance', *supra* note 186, at 456.

<sup>213</sup> Judge Bustamante, ICJ Reports 1962 (First Phase), *supra* note 192, at 355.

<sup>214</sup> Michael Reisman, 'Reflections on State Responsibility for Violations of Explicit Protectorate, Mandate, and Trusteeship Obligations', 10 *Michigan JIL* 231-240 (1989), at 232. See also Robert Jackson, *Quasi-States: Sovereignty, International Relations and the Third World* (Cambridge: CUP, 1990), at 71-74.

<sup>215</sup> Berman, 'Alliance', *supra* note 186, at 458. As an example of this asymmetric alliance, he discusses the minority protection scheme established to protect central European national groups which were not granted external self-determination by the Paris Treaties, designed, in the words of the PCIJ, to promote the flourishing of the 'national essence' of those groups (*Minority Schools in Albania*, PCIJ (Ser. A/B), No. 64 (1935), at 17), hence (a) heightening international authority (b) at the expense of sovereigns on the basis of (c) an alliance with the 'essence' of nationalist culture, while (d) excluding minorities themselves from international fora due to their potentially destabilising influence.

<sup>216</sup> Robert Redslob, *Le principe des nationalités* (Paris, 1931), at 36, quoted by Berman, 'Despair', *supra* note 79, at 1824. For Redslob's contribution to the modernist renewal of international law and legal reasoning see also Berman, 'Modernism', *supra* note 207, at 363-365.

[t]he doctrine of sovereignty has no application in this new system. Sovereignty over a mandated Territory is in abeyance; if and when the inhabitants of the Territory obtain recognition as an independent State...sovereignty will revive and rest in the new State. What matters ...is not where sovereignty lies, but what are the rights and duties of the Mandatory in regard to the area of territory being administered by it.<sup>217</sup>

In the inter-war framework, the concept of fiduciary administration was deemed the best means to mediate between nationalism and the ascertainment of indigenous claims to self-determination on the one hand, and the intentions by the great powers to engage in outright annexation of the relevant territories on the other. While claims to self-determination would soon challenge sovereignty's claim to representation by introducing a further criterion of legitimacy – the 'people' – which would play the role traditionally occupied by reason in naturalistic jurisprudence,<sup>218</sup> the Mandate system assumed the role of mediating between these two criteria. Rather than positioning itself on one side or another in the sovereignty/self-determination dilemma, the concept of trust wove a textured discourse between them. In short, the Mandate system was designed as a cobweb of obligations to keep pending sovereignty questions at bay.<sup>219</sup> The displacement of the foundational role of sovereignty by the recognition of nationalism shifted the ultimate competence over issues of collective and individual identity to an international authority. On the other hand, the Mandate system introduced the experimental model of provisional administration that was supposed to be solely grounded in the notion of the 'sacred trust of civilisation' bestowed upon the Mandatory power. Thus, it presented a fluid arrangement that not only displaced the notion of sovereignty as title to territory, but also temporarily acquiesced claims brought forward by the 'people'.

### 2.2.1 SELF-DETERMINATION AND THE REVERSION TO THE SOVEREIGNTY NARRATIVE

The notion of administration-in-trust did not only undermine the fundamental principle of territorial sovereignty. It also represented a new 'essential basis' upon which rights and responsibilities in an asymmetrical relationship between the metropolitan power and peripheral dependent people could be temporarily grounded. As such, this transitional basis of international law contained an enduring promise to which the international community became a party; trust itself contained foundational ideas. As *Anghie* demonstrated, both Mandate and Trusteeship systems were framed as civilising missions posited to traverse the chasm between different cultural worlds. It was through these administrative instruments that international law first promised to "fulfil its task of incorporating all territories into international society on equal terms as part of one, universal system"<sup>220</sup> and hence to manage the problem of cultural difference between the 'civilised' and 'uncivilised' that was so vehemently

<sup>217</sup> McNair, ICJ Reports 1950, *supra* note 173, at 150.

<sup>218</sup> Nathaniel Berman, 'Sovereignty in Abeyance: Self-Determination and International Law', 7:1 *Wisconsin ILJ* 51-104 (1988-1989), at 58. For naturalism's attempt to locate the binding force of international norms in sources outside sovereignty cf. David Kennedy, 'International Law and the Nineteenth Century: History of an Illusion', 65 *Nordic JIL* 385-420 (1996), at 397-398.

<sup>219</sup> Cf. Moritz Bileski, 'Die Entwicklung der Mandatsgebiete zur Unabhängigkeit', 13 *ÖZöR* 8-67 (1933), at 51. Bileski anticipated what would later become the argumentative armoury of the decolonization movement. Analysing the apparent conflict between national aspirations and the institution of the Mandate, he argued that the Mandate did not only serve as a vehicle to the development of institutions of self-government but represented a powerful obstacle to the realisation of those national aspirations.

<sup>220</sup> 'Heart', *supra* note 196, at 448.



proposed by positivist jurists.<sup>221</sup>

As a corollary of the paradigmatic '*mission civilisatrice*', the enduring promise entailed that, following the termination of the fiduciary administration exercised by the international community embodied in the League (and later the United Nations), *sovereignty would be reconstructed* along the lines of, and vested in, 'the peoples', an actor newly constituted by the UN Charter. The principle of self-determination, and its subsequent formulation as collective 'right', concretised the second promise as a continuing entitlement to exercise freedom from outside interference.<sup>222</sup> This more permanent promise of fiduciary administration operated under the assumption that sovereignty existed in a sort of linear continuum, and every 'dependent people' could be placed at some point along this ladder of civilisation based on its approximation to the ideal of a European nation-state.<sup>223</sup>

On the other hand, the foundational promise represented a radical departure from earlier conceptions of sovereignty exercised in the framework of colonialism: sovereignty in the non-European world had hitherto meant the complete negation of independence, authority, and authenticity of a subjugated people, and had been sustained by elaborate mechanisms of oppression and management. Through fiduciary administration, or so the promise went, Europe would depart from the practice of subordination and alienation of the periphery and replicate its own conception of sovereignty that gravitated around the notion of empowerment and authority. The machinery of international accountability operated to safe-guard the just treatment of the population and vested them with an inchoate title to be free from outside interference *erga omnes*.<sup>224</sup> This political process would later be legally crystallised in "all people's" right to "freely determine their political status and freely pursue their economic, social and cultural development".<sup>225</sup>

<sup>221</sup> For a discussion of positivist jurisprudence and its approach towards colonialism see Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law', 40:1 *Harvard ILR* 1-80 (1999), at 25 *et seq.*

<sup>222</sup> Antonio Cassese, *Self-Determination of Peoples. A Legal Reappraisal* (Cambridge: CUP, 1995), at 55. This point will be expanded upon in Chapter III.1.1, *infra* p.95.

<sup>223</sup> For an interpretation of the matrix of 'standards' as not so much as springing from conceptions of superiority than from the need for reciprocity in the dealings between European and non-European powers see Gerrit W. Gong, *The Standard of 'Civilization' in International Society* (Oxford: Clarendon Press, 1984). The idea that sovereignty could be 'graded' was implicit in the classification of mandates. As Bileski noted: „Der wiederholte Gebrauch des Wortes 'Entwicklungsstufen' in...Artikel 22 scheint im Zusammenhang mit der Einteilung der Mandate in Klassen, bei denen die Befugnisse des Mandatars immer schwächer werden, die Annahme nahelegen, daß das Ziel der vollen staatlichen Selbständigkeit erreicht werden soll, indem die verschiedenen Mandatsgebiete von ihren verschiedenen Standorten aus die Stufenleiter des Mandatssystems von unten nach oben zur vollen Selbständigkeit hin durchlaufen" ('Mandatsgebiete', *supra* note 219, at 16).

<sup>224</sup> Oral statement by the representative of the Netherlands, ICJ Pleadings 1971, Vol. II, at 129.

<sup>225</sup> Article 1(1) of the UN Covenant on Civil and Political Rights, 1966.

(i) 'SILENT ALCHEMY': NAMIBIA AND THE TRIUMPH OF THE TELEOLOGISTS

*'It is inconceivable that the interests of the people of a territory placed under the sacred trust of civilization..., over which the General Assembly exercised a supervisory role for 21 years and which has ultimately been brought under a direct responsibility of the United Nations, should be delivered into a juridical vacuum.'*<sup>226</sup>

Conceived as a temporary arrangement, fiduciary administration and international law began to operate in support of one overall *telos*: the development of institutions of self-government and the creation of local capacity that would, in principle, be prepared to take over responsibilities from the Mandatory. As *Wilson* put it at the Paris Peace Conference: "[t]he fundamental idea would be that the world was acting as trustee through a mandatory and would be in charge of the whole administration until the day when the true wishes of the inhabitants would be ascertained."<sup>227</sup>

The first ICJ opinion relating to South-West Africa serves to illustrate the extent to which the transitional paradigm – in which reciprocal obligations served to displace sovereignty at the periphery and mediate between claims and counter-claims to representation – had been relied upon. The Court affirmed unanimously that South Africa had no competence to modify the international status of a Mandate territory and that the competence to determine this status rested with South Africa acting *with the consent* of the United Nations. The Court further held that the Union continued to be bound by the international obligations laid down both in Article 22 of the Covenant and in the Mandate for South-West Africa, as well as by the obligation to transmit petitions from the inhabitants of that territory. Upon consideration, the ICJ's opinion confirmed the inadequacy of positivist doctrine regarding suspended sovereignty which proved unable to comprehensively address the transformations that were reflected by the temporary departure of the sovereign at the periphery of the international system.

Suggestions that the obligations of the Mandate had terminated with the dissolution of the League were rejected by the Court. To the contrary, it held that the provisions of the Mandate created an international status for the territory,<sup>228</sup> independent of the question whether one of the parties to the original instrument (i.e., the League) still existed. A transitional instrument had, it seemed, acquired a legal existence of its own. Rooted in a transitory regime of rights and obligations, it transcended the limits that contract law set in the event that one party to an arrangement disappeared as a legal entity. In a separate opinion to the ICJ's 1971 pronouncement, Judge *Dillard* made it crystal clear that a contextual, functional interpretation of a legal regime would have to take precedence over a textual reading:

[W]henever a long-term engagement, of whatever nature, is so interrupted, emphasis in attempting a reasonable interpretation and construction of its meaning and the obligations it imposes shifts from a textual analysis to one which stresses the object and purpose of the

<sup>226</sup> UN Interoffice Memorandum of Erik Suy, Legal Counsel, to Bernardo Zuleta, Under-General Secretary, 20 April 1982, UN Doc. 23A/NO 82, quoted by Andreas Junius, *Der United Nations Council for Namibia* (Europäische Hochschulschriften, Frankfurt a.M.: Peter Lang, 1989), at 73.

<sup>227</sup> Quoted by the representative of Pakistan, ICJ Pleadings 1971, Vol. II, at 136.

<sup>228</sup> ICJ Reports 1950, *supra* note 173, at 132.

engagement in light of the total context in which the engagement was located.<sup>229</sup>

The new 'essential basis' in which rights and obligations grounded themselves was that of trust, which supplied a special principle of legal succession. Operating independently of the intentions of the parties, it automatically effected the substitution of the United Nations' supervisory role for that of the League. This 'functional' approach to objective international regimes must be contrasted to the neo-positivist view that was at that time shared by Judge Fitzmaurice as well as Kelsen:

The trusteeship system did not automatically replace the mandate system, and the UN did not succeed to rights of the League of Nations as to the former mandated territories. There is no legal continuity in the relation of these two systems. The one ceased to exist long before the other came into existence.<sup>230</sup>

The Court did not follow such a static approach. It opined that the permanent nature of the rights created by the Mandate had established an 'objective international régime' – Judge McNair would later call it a dispositive (or constitutive) instrument with *erga omnes* effects.<sup>231</sup> In the post-colonial narrative, and particularly after the celebrated dictum of the ICJ in the *Barcelona Traction* case,<sup>232</sup> obligations flowing from the creation of such regimes belong to the class of international legal obligations which are neither synallagmatic nor reciprocal in kind, but arise in favour of all members of the international community.<sup>233</sup>

As Berman submits, this emerging international law has its own principles that come into play during the '*carence de souveraineté*'.<sup>234</sup> The supply of novel norms of legal succession to contractual relationships represented one of them. Not only had the sovereign been dislocated, the entity that had been party to, and supervised the performance of, the Mandate agreement (the League) had disappeared. Yet the set of obligations flowing from the initial arrangement, its *telos*, continued to bind the Mandatory South Africa. The Mandate system, devised as fiduciary administrative machinery under a transitional paradigm, had become the means through which international law had found its 'essential basis'. And this essential

<sup>229</sup> ICJ Reports 1971, *supra* note 56, at 157.

<sup>230</sup> Kelsen, *United Nations*, 1950, *supra* note 105, at 596-597.

<sup>231</sup> *Erga omnes* obligations arise, according to McNair, as permanent rights are created by, or in pursuance of, a treaty as well as through the semi-legislative authority of states particularly interested in the settlement or arrangement made. See Arnold McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961), at 255.

<sup>232</sup> Case concerning the *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain, Second Phase)*, ICJ Reports [1970] 3, at 32: "...[A]n essential distinction should be drawn between the obligation of a State towards the international community as a whole, and those arising vis-à-vis another State... By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*." Regarding the special status of self-determination as peremptory norm cf. also Judge Ammoun, *sep. op.*, *ibid.*, at 304. For a discussion of the case cf. Ignaz Seidl-Hohenveldern, 'Der Barcelona-Traction-Fall', 22 *ÖZöR* 255 (1971).

<sup>233</sup> Klein defines such 'status treaties' as treaties which create a territorial order which is relevant for third parties because of their intended realisation of an international public interest (*intendierte Gemeinwohlverwirklichung*). See his seminal *Statusverträge*, *supra* note 116, at 22-23. For *erga omnes* obligations in general see the penetrating study of Ragazzi, *Erga Omnes*, *supra* note 80, at 37 *et seq.* as well as Claudia Annacker, 'The Legal Régime of *Erga Omnes* Obligations in International Law', 46 *ÖZöRV* 131 (1993-1994).

<sup>234</sup> Berman, 'Despair', *supra* note 79, at 1867.

basis had a functional core. On the basis of this new functional essence, South Africa's obligations to report and account in respect of its administration of South-West Africa survived the dissolution of the League, as well as the relevant supervisory powers, now vested in its successor organisation, without the consent of the Mandatory power. The utilisation of the concept of an 'objective legal régime' in the 1950 Opinion was premised on the principle of effectiveness and its application to the original treaties constituting the Mandate system: the Court recognised that the removal of international supervision would effectively put an end to the whole concept of 'sacred trust'.<sup>235</sup> Consequently, in order to give effect to the original obligations assumed under the Mandate, the ICJ was compelled to read into the original documents a principle of succession in international association. This development has been termed the "triumph of the teleologists"<sup>236</sup> as certain objects and purposes were given effect by a rigorous functional approach to creating an objective international regime

Discussing the same 1950 Opinion that held that the United Nations must be substituted for the League as the supervisory organ, Judge *Lauterpacht* remarked, almost detachedly, that it "did no more than give effect to the main purpose of the legal instruments before it. That is the true function of interpretation."<sup>237</sup> The case showed that even such a fundamental change of circumstance as the disappearance of the League was not in itself a sufficient ground to declare an international arrangement to have lapsed if the change does not affect the *raison d'être* and the 'original object' of that arrangement.<sup>238</sup> It is indeed remarkable that lacunae in the regulatory framework of a global administrative system were filled by increasingly constructive solutions that were only compatible with the basic premise of the administrative instrument itself (the Mandate's promises of self-determination and non-annexation of territories), but certainly not with a traditional application of general international law that had so far governed the *novatio* of a contractual relationship. In sharp contrast to these views were those of Judge *Fitzmaurice* in 1971, who, in dissent, opposed effective methods of treaty interpretation. He preferred a restrictive interpretation in favour of state sovereignty and denounced such constructive filling of lacunae as "some sort of silent alchemy".<sup>239</sup>

In this dynamic narrative, the Treaty of Versailles and the subsequent establishment of the League marked the beginning of the formation of instruments, based on municipal law and transposed to the international plane, through which the sovereign was substituted by a notion of administration-in-trust, while the right to self-determination was held in check by overlapping and reciprocal duties which were themselves supervised by the League. Or as *Lauterpacht* put it,

[The administering authorities] cannot cede or otherwise alter the status of trust territories

<sup>235</sup> Cf. Hersch Lauterpacht, *The Development of International Law by the International Court* (London: Stevens, 1958), at 278-9.

<sup>236</sup> Cf. John Dugard, 'Namibia (South West Africa): The Court's Opinion, South Africa's Response, and the Prospects for the Future', 11 *Columbia JTL* 14-49 (1972), at 20. See also his 'The Opinion on South West Africa ("Namibia"): The Teleologists' Triumph', 88 *South African LJ* 463 (1971).

<sup>237</sup> Advisory Opinion on *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, ICJ Reports [1956], at 56.

<sup>238</sup> Athanassios Vamvoukos, *Termination of Treaties in International Law. The Doctrine of Rebus Sic Stantibus and Desuetude* (Oxford: Clarendon Press, 1985), at 165.

<sup>239</sup> ICJ Reports 1971, *supra* note 56, at 239. Cf. also the dissenting opinions of Judges Fitzmaurice and Spender in ICJ Reports 1962, *supra* note 192, at 495, stating that "we do not accept the view that a treaty can be partyless".

except with the approval of the United Nations in which the residuary sovereignty must be considered to be vested... The relation of trust of 'tutelage' or '*fidei commissum*' implies fundamentally a relation of service and delegation wholly incompatible with any exclusiveness of rights of sovereignty on the part of the State concerned.<sup>240</sup>

As discussed later in this chapter, the Court applied a similar functional interpretation when it confirmed that South Africa's Mandate had been terminated. The Court seemed to agree that given the fiduciary essence of the Mandate and the political and social norms underpinning it, it would be indefensible to construct a system that intentionally precluded a judgment of violation or revocation notwithstanding the gravest breaches of responsibility by the Mandatory. Before turning to the issue of termination, we conclude, in any case, that creative legal solutions were devised in the sphere of international authority to respond "more directly to the service of the lives, current needs of our present-day society".<sup>241</sup> Such novel modes of experimentation were undoubtedly propelled by a re-definition of popular sovereignty and the underlying concept of the 'self'.

### 2.2.2 CLOSER SUPERVISION AND OBLIGATIONS UNDER THE TRUSTEESHIP SYSTEM

'Self-determination' in a post-mandate understanding sought to strike a synthesis between two initially diametrically opposed concepts: the first sought to dislodge sovereignty under a fluid fiduciary arrangement in order to liberate the peoples under Mandate from the 'strenuous conditions of the modern world', and its antithesis, the restoration of sovereignty, operationalised through the transfer of governmental power to a new sovereign that would be repatriated from legal exile: an empowered 'peoples'. As *Evans* put it in 1932, the logic internal to the Mandate system required that the "new state will receive its hitherto 'divided' sovereignty from the hands of the Council of the League of Nations, and such sovereignty will thereupon take 'normal shape'".<sup>242</sup>

The next section demonstrates the extent to which the ICJ took it upon itself to act as final arbiter between two essential claims: one, brought forward by the Mandatory who, having disavowed its promise of promoting the 'sacred trust', intended to prolong its territorial control; and a second claim by a different, injured (and putative) entity, the 'peoples' of South-West Africa that looked to the international community for assistance in their progress towards the goals for which the 'sacred trust' was instituted, and more concretely, towards the fulfilment of the permanent promise of popular sovereignty. Commenting on the 1950 ICJ Opinion on the *International Status of South West Africa*, *Lauterpacht* captured the intrinsic tension between the notions of trust and sovereignty that would haunt the ICJ for the next two decades:

The opinion is significant as it separates from formal sovereignty the otherwise complete authority of the Mandatory. The result – in accordance with what is the essence of the system

<sup>240</sup> Oppenheim, *International Law*, vol.1 (7<sup>th</sup> ed., *supra* note 64), at 214-216. For the functions and the internal structure of the *fideicommissum* see generally Johnston, *Roman Law*, *supra* note 172, at 18 *et seq.*

<sup>241</sup> Manley O. Hudson, 'The Prospect of International Law in the Twentieth Century', 10 *Cornell LQ* 419-459 (1924-1925), at 435.

<sup>242</sup> Luther H. Evans, 'The General Principles Governing the Termination of a Mandate', 26 *AJIL* 735-758 (1932), at 747. For the types of inquiry this generated see Corbett, 'League', *supra* note 78 and Geoffrey Butler, 'Sovereignty and the League of Nations', 1 *BYIL* 35-44 (1920-21).

of mandates and trusteeship – is to stress the functional divisibility of sovereignty and, thus, the absence from it, notwithstanding doctrinal logic, of any rigid element of absoluteness.<sup>243</sup>

(i) **NORMATIVE FRAMEWORK OF THE TRUSTEESHIP MECHANISM**

The institutional development of the United Nations is remarkable in its heightened authority and the confidence with which it pursued the decolonisation project. It constituted a renewed voice of an international order in which sovereignty was not pronounced primarily in favour of the state, but would rather be embroidered into an international organised structure that attempted to reconstruct sovereignty along the lines of self-determination once a fiduciary administration had fulfilled its functions. The innovations of the League were carried over to the United Nations system in the forms of an operational Trusteeship arrangement on one side, and an automatic non-self-governing arrangement on the other.<sup>244</sup> A sharp distinction was drawn at San Francisco between Chapter XI (Articles 73 and 74) of the Charter, applicable to all non-self-governing peoples (in which sovereignty and jurisdiction remained vested in the administering states), and Chapters XII and XIII, applicable exclusively to Trust territories. It was only with regard to the latter that supervision lay with the UN.

On the other hand, the provisions of Chapters XII and XIII went considerably beyond the Mandate system of the League. As its historical successor, the Trusteeship system was not limited to specific territories formerly belonging to the enemy. Rather, it was open to any territory placed under it by means of a Trusteeship agreement and hence fell outside of the fixed classification system set up by the League.<sup>245</sup> Yet the Trusteeship system assumed a very similar role by viewing the territories placed under it as a matter of concern for the United Nations as a whole, and their good administration as an obligation falling to the organisation. The essentially utopian idea that watched over the cradle of the League's creation, namely that international well-being would enter into the calculus of state action as the regime aspired to affect the psychology of sovereignty, was resuscitated and reinforced with a renewed focus on pursuing goals through cooperative agreements. Irrespective of where sovereignty may have rested, it placed the former mandated territories under a trusteeship that was to be eventually terminated under the Charter by the grant of self-government or independence. From a political point of view, the provisions of Articles 73 to 91 of the UN Charter may have emerged out of the need to find a suitable compromise to a series of conflicting interests. As one commentator laconically suggested, the provisions artificially reconciled clashing aspirations with the result that

[l]iberal humanitarianism received its satisfaction in the Declaration Regarding Non-Self-Governing Territories but conservative humanitarianism was made content by the limited application of the Trusteeship System proper. Military opponents of international rule were reconciled through the strategic trust provisions but those who saw in trusteeship a means of internationalizing future trouble spots received satisfaction through the possibility of the submission of any colonial area to the system. Economic liberals could take comfort in the open door provisions and economic protectionists in the corresponding escape clauses. Colonial nationalism

<sup>243</sup> Lauterpacht, *Development*, *supra* note 235, at 323.

<sup>244</sup> Cf., for instance, Donald S. Leeper, 'Trusteeship Compared with Mandate', 49 *Michigan LR* 1199-1210 (1951).

<sup>245</sup> James N. Murray, *The United Nations Trusteeship System* (Urbana: University of Illinois Press, 1957), at 43-44.

was temporary appeased but Colonial Empires seemed also to remain intact.<sup>246</sup>

Such complex synthesis aside, the important point remains that an international institution was given the task of recreating sovereignty out of the 'backward peoples' and territories brought under its fiduciary regime. Alternatively, the Trusteeship system anticipated that territories held in trust could also opt for their eventual reintegration into the jurisdiction of the former administering power as associated and dependent states.<sup>247</sup> 'Self-government', within the meaning of Article 76(b) of the Charter, could, of course, take the form of independence; or local autonomy within a larger association; or even the form of assimilation to a sovereign state provided that the inhabitants of the territory in question had attained a sufficient degree of political autonomy and reached a stage of political development enabling them to make a free and considered choice.<sup>248</sup>

The basic objectives of the trusteeship system were set out in Article 76 of the Charter. Article 79 specified that the terms of trusteeship for each territory to be placed under the system should be agreed upon by the 'states directly concerned' and be approved by the United Nations in accordance with the provisions of Articles 85 and 83 (for strategic areas). As such, the agreements were contracts between two legal personalities, the General Assembly and the administering authority.<sup>249</sup> They contained provisions (i) to promote development of political institutions; (ii) to assure the inhabitants a progressive share in the administration; (iii) and to take all other appropriate measures with a view to the political development of the inhabitants in accordance with Article 76(b).<sup>250</sup> As established in the form of treaties between the UN and the several administering authorities, the Trusteeship agreements were legal acts implementing Article 76 of the Charter. They possessed a contractual yet also 'objective' character and constituted a quasi-statutory basis for the trusteeship system conceived as a principal-agent relationship<sup>251</sup> according to which the UN would supervise the administrative authority as it recreated sovereignty by establishing the underlying structure – the political, social, and economic substance – of a state.

## (II) INSTITUTIONAL FRAMEWORK

However, the question of who would be a party to the trusteeship agreement, and therefore derive both rights and obligations from it, proved contentious. Initially, the view prevailed that

<sup>246</sup> Ernst B. Haas, 'The Attempt to Terminate Colonialism: Acceptance of the U.N. Trusteeship System', 7:1 *International Organization* 1-21 (1953), at 20.

<sup>247</sup> For the case of the West Indies cf., e.g., Margaret Broderick, *Associated Statehood – A New Form of Decolonisation*, 17 *ICLQ* 368-403 (1968), at 371 *et seq.*

<sup>248</sup> The option of effectively foregoing a claim for self-determination was clearly spelled out by the GA which declared in 1970 that "the free association or integration with an independent State or the emergence into any other political status freely determined by the people" would also constitute modes of implementing the right of self-determination (*Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States*, A/RES/2625 (XXV), 24 October 1970, UN Doc. A/8028 (1970)). The ambiguity with which an international regulatory authority pursued its mediation project by limiting the implications for sovereignty and claims to self-determination is most visible in cases of recent establishments of international territorial administrations, and particularly in those instances, such as Kosovo, where the question of 'final status' was left unresolved. See Chapter V.1.2, *infra* p.160.

<sup>249</sup> O'Connell, *International Law*, vol. 1, *supra* note 62, at 337.

<sup>250</sup> For a discussion of the objectives of Article 78 see Bruno Simma, *The Charter of the United Nations. A Commentary* (Vol.II, 2<sup>nd</sup> ed., Munich, 2002), at 1106-1111.

<sup>251</sup> Parry, 'Trusteeship Agreements', *supra* note 193, at 176.

a trusteeship agreement would be an inter-state treaty concluded under the auspices of the UN. As *Parry* wrote in 1950, "it is not possible to maintain with any confidence that the United Nations is, in the Charter, envisaged as a party to the Trusteeship agreements. If that had been intended, it could scarcely have been stated more obscurely".<sup>252</sup> The high-priest of textuality, Sir *Fitzmaurice*, also appears to have taken a contrary view in his separate opinion in the *Northern Cameroons* case in which he stated that

the Trust Agreement was concluded by being embodied in a resolution of the United Nations Assembly, and it has been common ground throughout the present case that the sole entities formally parties to it were the Administering Authority on the one hand, and the United Nations represented by the General Assembly on the other.<sup>253</sup>

The GA was thus charged with exercising concurrent jurisdiction with the Trusteeship Council regarding the supervision of the administration of the trust territories.<sup>254</sup> These contrasting opinions reveal the extent to which the original thesis, according to which the Trusteeship system consisted of an inter-state treaty while the process of bringing a territory under it involved two separate stages – that of a horizontal agreement between states and of subsequent approval by the appropriate UN organ – had been departed from. In the *South-West Africa* opinion, these two stages collapsed into one where the United Nations would step in as a contracting party. Although it would not stand on an equal footing with the prospective administrative power concerning the negotiation of the agreement, the UN would still assume supervisory functions not dissimilar to a principal-agent relationship. The fundamental importance of the Trusteeship system in the scheme of the Charter was expressed by the fact that the ultimate responsibility for its operation lay with the GA, and, with regard to strategic areas, with the SC. These bodies approved the Trusteeship agreements and any modification required their consent. Scholars seemed to agree that from the perspective of material content, the Trusteeship System represented a considerable advance over the Mandate System with respect to international supervision and accountability.<sup>255</sup>

Chapter XIII of the UN Charter, dealing with the composition, powers, and voting procedures of the Trusteeship Council, provided a more elaborate procedure and granted more extensive powers of supervision than was the case with the Permanent Mandates Commission (PMC) under the League system. The outcome of the drafting process was initially greeted by analysts who concluded that, in a comparison of the two administrative modalities, the novel Trusteeship system would represent the nadir of accountability in the performance of

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<sup>252</sup> *Id.*, at 166.

<sup>253</sup> Case concerning the *Northern Cameroons (Cameroons v. United Kingdom)*, Preliminary Objections, ICJ Reports [1963] 15, at 113.

<sup>254</sup> The (now defunct) Articles 87 and 88 stipulated that the administering authority was to report annually to the GA concerning the territory it was entrusted to administer. With regard to strategic areas, the functions of the UN were exercised by the SC (Art. 83). For the functions of the General Assembly/Security Council and the Trusteeship Council towards trustee territories, see Veicopoulos, *Traité*, *supra* note 112, at §§833-851 (GA), §§852-855 (SC) and §§856-916 (TC).

<sup>255</sup> Murray, *Trusteeship System*, *supra* note 245, at 45. Lauterpacht concluded that the essential novelty of the Mandates and Trusteeship Systems "lay in the machinery of international supervision intended to secure the effectiveness of the System" (*Development*, *supra* note 235, at 279). According to Chowdhuri, "[p]erhaps the predominant element, which pervades the entire administration of the Trust Territory, is the principle of international accountability whereby the Trustee Power exercises its authority in accordance with the decisions of the international community" (*Mandates*, *supra* note 163, at 146).



the 'sacred trust'. The former Director of the Mandate Department of the League commented, perhaps idealistically: "What is certain today is that in the intentions of the drafters of the Charter, persuasion and the discreet political pressure of emulation, which were the main motive agents of the Mandates System, are to be supplemented and even, if need be, replaced by coercive and direct intervention."<sup>256</sup>

The peremptory language of Article 73 UN Charter represented a clear departure from the framework in which the Mandate System had operated. As *Reisman* noted, the administration of non-self-governing territories "automatically imposed on the superordinated party specific obligations for the welfare of the inhabitants of the territory".<sup>257</sup> Yet both the Mandate and the Trusteeship Systems were devised in such a way as not to subordinate the Mandatory or the administering authority to the dictates of a supervisory body. Illustrating his views by reference to the trusteeship provision, which he regarded as relevant to that of Mandates, Judge *Lauterpacht* concluded in 1955 that

[t]he Trusteeship Agreements do not provide for a legal obligation of the Administering Authority to comply with the decisions of the organs of the United Nations in the matter of trusteeship. Thus there is no legal obligation, on the part of the Administering Authority to give effect to a recommendation of the General Assembly to adopt or depart from a particular course of legislation or any particular administrative measure... The Administering Authority, not the General Assembly, bears the direct responsibility for the welfare of the population of the Trust Territory ... In fact States administering Trust Territories have often asserted their right not to accept recommendations of the General Assembly or of the Trusteeship Council... That right has never been seriously challenged. There are numerous examples of express refusal on the part of an Administering Authority to comply with a recommendation.<sup>258</sup>

More than a decade later, the dictum in the *South West Africa* cases was equally sceptical on the issue whether a principal-agent relationship between the Administering Authority and the supervisory organ had been concluded. Pertaining to the 'conduct' provision of the Mandates, the Court observed that "it was never the intention that the Council should be able to impose its views on the various Mandatories – the system adopted was one which rendered this impossible".<sup>259</sup> From this formal interpretation of the League arrangement, it appeared to be a long way to the authoritative statement of the Court another five years later in which it held that accountability of the Mandatory had always been understood as the flip-side of the peoples' entitlement to good governance:

The acceptance of a Mandate...connoted the assumption of obligations not only of a moral but also of a binding legal character; and, as a corollary of the trust, 'securities for [its] performance' were instituted [§7 of Article 22 of the Covenant] in the form of legal accountability for

<sup>256</sup> William Rappard, 'The Mandates and the International Trusteeship Systems', 61 *PSQ* 408-19 (1946), at 416.

<sup>257</sup> Reisman, 'State Responsibility', *supra* note 214, at 236 (italised in the original).

<sup>258</sup> Advisory Opinion on *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa*, ICJ Reports [1955] 67, at 116.

<sup>259</sup> *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase (Judgment), ICJ Reports [1966] 6, at 46.

its discharge and fulfilment... Thus the reply to the essential question, *quis custodiet ipsos custodes?*, was given in terms of the mandatory's accountability to international organs.<sup>260</sup>

At the centre of its reasoning was the assertion, made by the Court in 1962, that judicial protection by the PCIJ of the 'sacred' trust in each Mandate was an essential feature of the system itself while the administrative supervision by the League was a 'normal security' to ensure the full performance of the 'sacred trust' by the Mandatory.<sup>261</sup> Inspired by the function of the Mandate system to promote the exercise of the right to self-determination of peoples, the organised community of states did not only limit the powers of the Mandatory but also made these limitations amenable to judicial review and protection by the PCIJ.<sup>262</sup> It eventually also subordinated its own powers to attainment of this objective. This development represented the second leap of what can be termed an embryonic version of institutionalised accountability from the initial starting point in 1919 that sought to schematically transplant, into the domain of international law, institutions initially devised by Roman and common law under which the *tuteur* was responsible for the performance of the trust vested in him.

The UN Charter provided its own contingent regime for securing compliance by the Administering Authority with their respective obligations regarding the objectives of the system. In contrast to the PMC, the Trusteeship Council was purposely designed as a political organ, constituted as one of the principal organs of the new world body. It would function as the right arm of the plenary representative organ, the GA, which in turn would operate under a two-thirds majority rule and not under the unanimity requirement as the League Council did. All of the functions of the UN regarding Trusteeship Arrangements (for all areas not designated as strategic territories) – the supervision of administration and the policing of the obligations owed both to the people of a territory and to the UN itself – were vested exclusively in the GA.<sup>263</sup>

Under its authority, the Trusteeship Council was to (i) consider reports by the administering authority; (ii) in consultation with the latter, accept and examine petitions from the inhabitants of trust territories; (iii) arrange for periodic visits to trust territories at times agreed upon with the administering authority;<sup>264</sup> (iv) formulate questionnaires on the political, economic, social, and educational progress of the inhabitants, that were to be used as templates for the annual reports submitted to the GA by the administering authority; and (v) take any other action in conformity with the Trusteeship agreements.<sup>265</sup> Within their general ambit, these legal obligations were to be fulfilled by the administering power and by the Trusteeship Council; they were both narrower and more comprehensive than those stipulated by the mandate agreements concluded under Article 22 of the League Covenant.

<sup>260</sup> ICJ Reports 1971, *supra* note 56, at 29-30.

<sup>261</sup> ICJ Reports 1962, *supra* note 192, at 336.

<sup>262</sup> Cf. *sep. op.* Sir Spender in the *Northern Cameroons case*, *supra* note 253, at 71 *et seq.*

<sup>263</sup> Article 87 of the UN Charter.

<sup>264</sup> Visiting Missions were one of the Trusteeship system's principal innovations, as compared to the machinery set up under Art. 22 of the Covenant. Cf. Veïcopoulos, *Traité*, *supra* note 112, at §§1006 -1025. For some of the procedural difficulties that arose in connection with their composition see Thullen, *Problems*, *supra* note 211, at 70-75.

<sup>265</sup> For a general discussion of the mechanics of the Trusteeship Council and its rules of procedure, see Murray, *Trusteeship System*, *supra* note 245, 128 *et seq.*

The second objective of the trusteeship system, enshrined in Article 76(b) of the Charter – setting territories under fiduciary administration on a clear path towards self-government or independence – incorporates the central tenet of the Mandate system, while going beyond it.<sup>266</sup> Article 22 of the Covenant had confined the Mandate's objective to the "well-being and development" of the inhabitants under it. The framers of the Charter boldly added "progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned", thus making the first, more permanent promise to transfer values whose local implementation is measurable by development indicators, from the European core to the periphery.<sup>267</sup> In all, the framework resembled a system through which the performance of both moral and legal obligations was continuously supervised. As Chowdhuri convincingly stated, a direct comparison between the Mandate- and the Trusteeship system showed that the emphasis has shifted from the mere prohibition of abuses under the former to the more positive aspect of constructive development in political, economic, social, and educational spheres.<sup>268</sup> In the exercise of its functions, however, the Trusteeship Council only had force of persuasion and public opinion to ensure compliance with its recommendations.

Two important issues shall be highlighted here to summarise the ideas presented so far and to lay the groundwork of the substantive discussion in the next section. The first issue relates to the capacity to terminate an agreement that benefits a third party, namely the inhabitants of a territory held in trust. One could argue that the ultimate test of the proximity of a supervisory relationship between a UN principal organ and an administering power lies in determining who would eventually have the power to terminate the Mandate or trusteeship agreement. Incidentally, the question of the removal of an administering power was a much-debated point under the Mandate system, particularly in connection with the withdrawal of Japan from the League and its violation of the military clauses of the mandate.<sup>269</sup> This issue also preoccupied the Security Council in 1947 when it debated its competence to deprive an enemy state of its Mandate prior to a peace settlement.<sup>270</sup> Curiously enough, none of the draft proposals submitted at San Francisco had referred to any provision for termination or substitution of Trusteeship. Until the resolution of the South-West Africa dispute discussed below, it was held that only the administering power was in a position to determine the nature and character of a fiduciary bond which it was willing to propose to the UN and undertake to administer. The question whether the right to revocation and transfer rested with the *mandant* under the Roman law of *mandatum* had not yet been answered. Expressed in modern terms, the question concerned the issue whether the international status of a territory could be changed unilaterally, based on the United Nation's finding of a material

<sup>266</sup> As discussed above, the preparation for self-government or independence had only been specifically envisaged for 'A'-Mandates.

<sup>267</sup> Sayre noted that while each of the ten trusteeship agreements specified in some details the means for promoting political advancement, none specifically amplified the words 'self-government' or 'independence' ('Legal Problems', *supra* note 196, 280, at footnote 41).

<sup>268</sup> Chowdhuri, *Mandates*, *supra* note 163, at 11. For example, all administering authorities had accepted, in the trusteeship agreement, to receive visiting missions. Cf. Henry G. Schermers and Niels M. Blokker, *International Institutional Law. Unity Within Diversity* (Boston/Leiden: M. Nijhoff, 2003), at §1415 (with references).

<sup>269</sup> Wright, *Mandates*, *supra* note 27, at 520-21.

<sup>270</sup> SCOR (II), 113<sup>th</sup> meeting, 26 February 1947, at 413.

breach of contract by a 'rogue' administering power, and, if yes, by which UN organ.<sup>271</sup>

The second issue, closely related to the question of power to terminate a fiduciary bond and to undertake what necessarily amounts to a territorial disposition, concerned the general capacity of the United Nations to administer territory, either within the framework of the Mandate or the Trusteeship system, or outside of it. As demonstrated earlier, the tendency to vest the UN or one of its subsidiary organs with increasing responsibilities of territorial administration began with the *Resolution on the Future Government of Palestine* adopted by the GA in 1947, delegating the responsibility for administering the City of Jerusalem as '*corpus separatum*' to the Trusteeship Council.<sup>272</sup> We recall that a two-thirds majority of the members of the UN had thus established that a principal organ could be called upon to perform tasks outside the Trusteeship system. To an extent hereto unheard of, this tendency brought out the willingness of UN member states to activate the 'latent capacities' of the UN regarding an immediate political problem.

This willingness would crystallise again, twenty years later, with the creation of the Council for Namibia, upon which the UN General Assembly bestowed legal title to administer the territory after revoking South Africa's mandate. As we will see in the subsequent section, the process of internationalisation of a territory through which an entity was to be directly administered by a subsidiary organ of the UN necessitated the granting of a *sui generis* legal personality to the territory on whose behalf the international organisation acted, hence further widening the gap between the application of the rules of classical international law and the novel legal responses that fiduciary administration had introduced.

In order to wind up the discussion on Mandates and Trusteeships, the following table supplies a taxonomy of territories under these respective fiduciary administrations.

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<sup>271</sup> Marston, 'Termination', *supra* note 188, at 14-28.

<sup>272</sup> UN Doc. A/516, 25 November 1947.

(IV) TABLE: MANDATES AND TRUSTEESHIP TERRITORIES

LN Mandate system		UN Trusteeship system	
Territory (Mandatory)		Territory (Trustee)	
'A' Mandates	Palestine and Transjordan (GB) • M-terms approved by LN July 1922 • Mandate for Palestine terminated by GB May 1948	Trusteeship territories	Cameroons, Br. (UK) • T-agreement approved by UN Dec. 1946 • North section joined to Nigeria (June 1961), south section to Cameroons (Oct. 1961)
	Syria and Lebanon (FR) • M-terms approved by LN July 1922 • Mandate unilaterally terminated without bilateral treaty • UN admission 1946		Cameroons, Fr. (FR) • T-agreement approved by UN Dec. 1946 • UN admission Sept. 1960 (A/RES/1476 (XV))
	Mesopotamia (Iraq, GB) • M-terms embodied in 'Treaty of Alliance' btw. GB and Iraq (signed October 1922), approved by LN Council in Sept. 1924 • Termination of the Mandate by the LN Council • LN admission in Oct. 1932		Ruanda-Urundi (B) • T-agreement approved by UN Dec. 1946 • UN admission as Rwanda and Burundi Sept. 1962 (A/RES/1748 (XVIII) and 1749 (XVII))
'B' Mandates	Cameroons (5/6 <sup>th</sup> FR; remainder GB) • M-terms approved by LN July 1922		Tanganyika (UK) • T-agreement approved by UN Dec. 1946 • UN admission as Tanzania Dec. 1961 • A/RES/1667 (XVI)
	Togoland (2/3 <sup>rd</sup> FR; remainder GB) • M-terms approved by LN July 1922		Togoland, Br. (UK) • T-agreement approved by UN Dec. 1946 • joined with Gold Coast to form Ghana, admitted to UN March 1957 • A/RES/1118 (XI)
	East Africa (Tanganyika, GB; Rwanda and Urundi, B) • M-terms approved by LN July 1922		Togoland, Fr. (FR) • T-agreement approved by UN Dec. 1946 • UN admission as Togo Sept. 1960 • A/RES/1477 (XI)
'C' Mandates	South-West Africa (SA) • M-terms approved by the LN Dec. 1920 • Mandate terminated Oct. 1966 (A/RES/2145 (XXI)) • UN admission as Namibia		New Guinea (AUS) • T-agreement approved by UN Dec. 1946 • UN admission as Papua New Guinea Oct. 1975 • A/RES/3368 (XXX)
	Samoa (NZ) • M-terms approved by the LN Dec. 1920		Nauru (AUS) • T-agreement approved by UN Nov. 1947 • UN admission 1968
	Nauru (GB, AUS, NZ) • M-terms approved by the LN Dec. 1920		Somalia (I) • T-agreement approved by UN Dec. 1950 (limited to 10 years) • UN admission Sept. 1960 • A/RES/1478 (XV)
	German New Guinea (and German islands in the Pacific south of the Equator other than Samoa and Nauru, AUS) • M-terms approved by the LN Dec. 1920		Western Samoa (NZ) • T-agreement approved by UN Dec. 1946 • UN admission Dec. 1976 • A/RES/31/104 (XXXI)
	Yap (and other German islands in the Pacific north of the Equator, JP) • M-terms approved by the LN Dec. 1920	Strat. Areas	Pacific Islands (Marianas, Caroline, Marshall Islands, US) • T-agreement approved by the SC April 1947 • Admitted to UN as Federated States of Micronesia Sept. 1991 (A/RES/46/2 and 46/3), Marshall Islands Dec. 1994 (A/RES/49/63) and Palau Dec. 1994 (A/RES/49/63)
Special LN-supervised regimes	Germany renounced the government of the Saar Territory by the LN (Peace Treaty of Versailles, 28 June 1919). Between 1920 and 1935, Germany's territorial sovereignty was reduced to a <i>nudum jus</i>		By A/RES/181 (A+B) (29 November 1947), the GA endorsed the proposal of UNSCOP that envisaged Jerusalem being placed under an international regime, constituting it as a ' <i>corpus separatum</i> '. The Trusteeship Council, to which the Governor would be accountable, was designed to discharge the responsibilities of the UN in this regard. The plan was rejected and never entered into force.
	Danzig was severed from Germany and constituted as 'Free City' under the protection of the LN (17 November 1920) and a High Commissioner appointed by it	Special UN-supervised regimes	Following the Peace Treaty with Italy (10 February 1947), the 'Free Territory of Trieste' was envisaged as an independent state entity based on a 'Permanent Statute' under the direct control of the SC and administered by a Governor to prevent it from being annexed by Italy or YU.
	Upper-Silesia		By A/RES/2145 (XXI) of 1966, the GA terminated South Africa's mandate over South West Africa (Namibia), thus placing it under the direct responsibility of the UN Council for Namibia. South Africa responded by declaring its intention not to withdraw from the territory.

### 2.2.3 SOUTH-WEST AFRICA REVISITED

*'It is...difficult to see what the world organisation would do with the territory if it had it.'*<sup>273</sup>

The establishment of the UN Council of Namibia, ineffective and contentious as it was, represents the apparent drawing together of the two threads so far laid throughout the present chapter. Firstly, South-West Africa had been the site vacated of sovereign title in which obligations and rights were reconfigured according to the notion of trust in which international law found its transitional 'essential basis'. Secondly, notwithstanding the transitionality of the arrangement, we are able to detect a peculiar permanent essence, the promise of self-determination, in the continued operation of trust. The case is a good starting point for our examination of how an imposed divorce between title to territory and effective control – expounded upon in Chapter I – led to a paradoxical situation in which a territory under international authority was admitted to a number of specialised UN agencies. It might also hold the key to several interrelated problems that we will tackle in the third chapter, particularly regarding the status of internationalised territories and their partial legal personality. An inquiry into the long and tortuous role of the UN in the dispute over South-West Africa also furthers the more radical propositions, advanced in Chapter IV, that deal with the dual nature of international administrations.

In order to comprehend the issues at hand, we shall review, in summary fashion, the background to the Namibia dispute that concerned the UN for more than four decades. The significance of the various acts performed by relevant governments at the introduction of the Mandate system, of which this thesis has previously spoken, culminated in the adoption of GA Resolution 2145 (XXI) terminating South Africa's mandate over the territory.

#### (I) BACKGROUND

As Germany was divested of all her colonial possessions following the end of WWI,<sup>274</sup> German South West Africa passed to South Africa through the Mandate for the Administration of German South West Africa conferred upon His Britannic Majesty for, and on behalf of, the Government of the Union of South Africa, confirmed and defined by the League's Council.<sup>275</sup> This gave the Mandatory full powers of administration and legislation over the territory but reserved the right to define more explicit powers to the League Council. As discussed, 'advanced nations' were under this system bestowed with a Mandate to govern former colonies whose inhabitants were not considered to be able to govern themselves, in accordance with the principle that "the well-being and development of such peoples form a sacred trust of civilisation".<sup>276</sup>

<sup>273</sup> George F. Kennan, 'Hazardous Courses in South Africa, 49 *Foreign Affairs* 218-236 (1970-1971), at 227.

<sup>274</sup> League of Nations Covenant Articles 119-127. For a general discussion see Solomon Slonim, *South West Africa and the United Nations: An International Mandate in Dispute* (Baltimore: JHU Press, 1973), at 22 *et seq.*

<sup>275</sup> Cf. Isaak I. Dore, 'Self-Determination of Namibia and the United Nations: Paradigm of a Paradox', 27:1 *Harvard ILJ* 159-191 (1986), at fn. 11.

<sup>276</sup> League of Nations Covenant Art. 22, §1.

By accepting the Class 'C' mandate over South-West Africa from the League,<sup>277</sup> South Africa became the legitimate government of the territory, while it had to accept the responsibilities and obligations inherent in the Mandate system. The transfer of legal title to administer and legislate for the territory thus created fiduciary obligations, particularly regarding the promotion of the 'material well being and the social progress of the inhabitants of the territory'.<sup>278</sup> By prohibiting the annexation of Mandate territories,<sup>279</sup> requiring periodic reports to the League,<sup>280</sup> and emphasising the concept of 'sacred trust', the Mandate system established the supervisory role of the League.<sup>281</sup>

Much of the legal controversy over South-West Africa after WWII can be traced back to the ambiguities surrounding the transition from the League (which supervised South Africa's administration of the territory until 1940) to the United Nations. Although the supervision by the League had effectively ended with the dissolution of the body, the establishment of the UN Trusteeship Council and the transition of mandates from the former to the latter became a fundamental source of contention – particularly with regard to South-West Africa. When the UN GA attempted to seek a commitment from South Africa to some system of international accountability for the administration of the territory, its demands were met with solid non-compliance. In effect, South Africa claimed it was absolved from any further obligation of international accountability concerning South-West Africa.<sup>282</sup> Moreover, the Union announced its intention to annex the territory and later, after the nationalist government came into power in Pretoria in 1948, contended that the mandate had lapsed upon dissolution of the League. The Trusteeship Council, reporting in 1948 on the (sparse) data submitted by the South African government, commented that

[t]he indigenous inhabitants have no franchise, no eligibility to office and no representation...in the administration of the territory... [T]here is an expenditure of little more than ten percent of the budget on the indigenous inhabitants, who comprise approximately 90 percent of the entire population.<sup>283</sup>

Indeed, the Mandate system, itself a novel arrangement in the international order, had spawned a unique legal situation.<sup>284</sup> South Africa's recalcitrance would tax the United Nations machinery to its utmost in the coming decades as resolutions and adjudications

<sup>277</sup> As previously stated, the Mandates were to be designated as 'A', 'B' or 'C' depending on the "state of development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances" (*id.*, §3). 'C' mandates were regarded as "best administered under the laws of the mandatory as integral portions of its territory" because of such factors as sparse population, small size, remoteness of territory from the "centres of civilisation" or their geographical contiguity to the territory of the mandatory (*id.*, §6).

<sup>278</sup> Mandate for South West Africa, Art. 2. The text of the Mandate is reprinted in *Terms of League of Nation Mandates*, UN Doc. A/70, No. 10 (1946).

<sup>279</sup> ICJ Reports 1950, *supra* note 173, at 131-2.

<sup>280</sup> This obligation was specified in Art. 6 of the South West Africa mandate, *supra* note 278.

<sup>281</sup> See Anonymous Note, 'The United Nations, Self-Determination and the Namibia Opinion', 82 *Yale LJ* 533-558 (1973), at 535-8.

<sup>282</sup> Cf. Slonim, *South West Africa*, *supra* note 274, at 101.

<sup>283</sup> GAOR (III), A/INF/28+Add.2, Supplement 4, at 42 (1948).

<sup>284</sup> For accounts of the diplomatic history with regard to Namibia's struggle for independence see Maurice Kamto, 'L'accession de la Namibie à l'indépendance', 94:3 *RGDIP* 577 (1990) and Ronald Dreyer, 'The United Nations and Namibia: An Overview (1946-1990)', 5 *International Geneva Yearbook* 26 (1991).

would fail to wrench the territory from the Mandatory's grasp. Faced with these irreconcilable positions, the GA requested the ICJ in 1950 to render an Advisory Opinion on the territory's legal status. The ICJ ruled that the Mandate had survived the demise of the League and South Africa's responsibilities continued to include the duty to submit annual reports on the administration of the mandate, and the duty to transmit petitions from the territory's people to the Trusteeship Council.<sup>285</sup> Furthermore, all supervisory functions previously exercised by the League were to be seized by the United Nations. Like the League process, the UN regime assigned ultimate responsibility for such territories to the international community, while temporarily delegating that responsibility to a supervisory state.<sup>286</sup> It advised the GA that not only did the territory remain under the mandate of South Africa (including the international obligations set out in Art. 22 of the Covenant), its international status could only be modified by the South African government with the consent of the UN.<sup>287</sup>

The supervisory functions regarding the fulfilment of trustee obligations, reconfigured as they had been, appear to have survived the termination of the original Mandate agreement. As discussed above, the Mandate was seen to have created an international regime that continued to produce legal obligations as long as the *raison d'être* and the original object of the legal instrument remained to be attained.<sup>288</sup> By emphasising the character of the Mandate as an 'objective international régime' (and hence engaging in what *Fitzmaurice* had called "some sort of silent alchemy")<sup>289</sup>, the Court demonstrated that fulfilment of the obligations flowing from the instrument neither depended on the continued legal existence of the League nor of its supervisory organ. It thus created a *de facto* succession between the League and the UN in so far as South Africa's obligation to submit to international supervision of the Mandate was concerned. As one writer remarked, this regime "was essentially of judicial origin" and in conferring supervisory powers on the GA, the Court fulfilled "an essentially creative, and not just interpretative role in its capacity as the principal judicial organ of the United Nations."<sup>290</sup>

International opinion firmly crystallised against South Africa after Ethiopia and Liberia had brought unsuccessful proceedings before the ICJ in 1962<sup>291</sup> and generated a consensus that South Africa's governance of Namibia violated its obligations as a Mandatory, as well as

<sup>285</sup> ICJ Reports 1950, *supra* note 173, at 133 and 136-37. The GA had invited South Africa to propose a trusteeship agreement for South West Africa in A/RES/141 (II), 1 November 1947, UN Doc. A/519 (1947), at 47, and the Union complied with one of its obligations as mandatory power when it submitted a report of its administration (UN GAOR (I), 1104<sup>th</sup> Plenary Meeting, at 573, UN Doc. A/422 (1947)) before declining to accept the trusteeship path.

<sup>286</sup> Compare UN Charter Articles 75 and 81 with LN Covenant Art. 22 (2).

<sup>287</sup> ICJ Reports 1950, *supra* note 173, at 143-44. See Anonymous Note, 'Namibia Opinion', *supra* note 281, at 546.

<sup>288</sup> See Eckart Klein, 'International Régimes' in 2 *EPIL* 1354-1359 (1995), at 1355 *et seq.* as well as Marston, 'Termination', *supra* note 188, at 31.

<sup>289</sup> *Supra*, note 239.

<sup>290</sup> Slonim, *South West Africa*, *supra* note 274, at 122.

<sup>291</sup> *South West Africa* cases, ICJ Reports 1962, *supra* note 192. Cf. the authoritative analyses of the proceedings by Elisabeth S. Landis, 'The South West Africa Cases: Remand to the United Nations', 52 *Cornell LQ* 627-71 (1967) and John F. Crawford, 'South West Africa: Mandate Termination in Historical Perspective', 6 *Columbia JTL* 91-137 (1967), at 133 *et seq.* Although the ICJ decided it could hear the merits of the dispute, it subsequently held that Ethiopia and Liberia lacked the necessary standing to raise the issue since the right to supervise the mandate belonged to the League, not to its members (ICJ Reports 1966, *supra* note 259, at 28-29).



breaching customary international law on self-determination. The UN's activism, that had so far gravitated around Namibia's demands for decolonisation and self-determination, led to the legally pivotal termination of the Mandate of South-West Africa in 1966.<sup>292</sup> In pertinent parts, the Assembly declared that "South Africa has failed to fulfil its obligations in respect of the administration of the Mandated Territory and to ensure the moral and material well-being and security of the indigenous inhabitants...and has, in fact, disavowed the Mandate". Further, it decided that South Africa has no other right to administer the Territory and that henceforth South West Africa comes under the direct responsibility of the United Nations".<sup>293</sup>

## (II) LEGAL BASIS FOR TERMINATING THE MANDATE

To the extent that Resolution 2145 (XXI) was adopted by the GA as the supervisory authority and as a party to the contractual relationship with South Africa arising from the Mandate, the resolution proved to be *infra vires* and constitutionally valid, particularly after its endorsement by the Security Council in a number of Resolutions.<sup>294</sup> The question of non-compliance with GA resolutions had first been submitted to the SC in 1969. In its Resolution 264, the Council recognised that the GA terminated the Mandate of South Africa over Namibia and assumed direct responsibility for the Territory until its independence and considered that "the continued presence of South Africa in Namibia is illegal and contrary to the principles of the Charter and the previous decisions of the United Nations".<sup>295</sup>

A few months later, the Security Council condemned South Africa "for its refusal to comply with Resolution 264 (1969) and for its persistent defiance of the authority of the United Nations".<sup>296</sup> Further, the SC declared that "the defiant attitude of the Government of South Africa towards the Council's decisions undermines the authority of the United Nations".<sup>297</sup> Finally, it noted the continued flagrant refusal of the Government of South Africa to comply with its decisions and called upon all states to take various measures with respect to South Africa and Namibia.<sup>298</sup> South Africa, which did not accept the termination of the mandate, responded in October 1969 by declaring its intention not to withdraw from the territory, effectively freezing the diametrically opposed positions of the Union on the one side and the

<sup>292</sup> See, generally, John Dugard, 'The Revocation of the Mandate for South West Africa', 62 *AJIL* 78-97 (1968). For a discussion of the political background to A/RES/2145 (XXI) of 27 October 1966 (UN Doc. A/6316 (1966) see Laurent Lucchini, 'La Namibie: une construction des Nations Unies', 15 *AFDI* 355-374 (1969) at 356 *et seq.*

<sup>293</sup> A/RES/2145 (XXI), Art. 3 and 4. Article 6 of the Resolution established a fourteen-member *Ad Hoc* Committee for South-West Africa to recommend practical means by which the territory should be administered. The ICJ held in 1971 that, through S/RES/284 (*supra* note 53), the UN had formally terminated SA's mandate over Namibia and had resumed formal control over the territory.

<sup>294</sup> The proposition that the GA and the SC could terminate the Mandate even if the GA, acting alone, could not have done so, was advanced in the written statement by the United States in the *Legal Consequences* case (ICJ Pleadings 1971, Vol. I, 877) and in the oral statement of the representative of the Secretary General (*ibid.*, at 53: "Whatever legal questions one may have had concerning the right of the General Assembly to act alone, or the right of the Security Council to act alone...it cannot be denied that the combined action of both principal organs with respect to Namibia is effective beyond any constitutional or legal challenge").

<sup>295</sup> S/RES/264 (XXIV), 1465<sup>th</sup> meeting 1 (1969).

<sup>296</sup> S/RES/269 (XXIV), 1497<sup>th</sup> meeting 2 (1969).

<sup>297</sup> S/RES/276 (XXV), 1529<sup>th</sup> meeting 1 (1970), §3.

<sup>298</sup> S/RES/283 (XXV), 29 July 1970, reproduced in 9 *ILM* 1087 (1970), §4 of the Preamble.

General Assembly and the Security Council on the other.<sup>299</sup> Despite the defiant attitude South Africa displayed, from the viewpoint of international law, and in the absence of any intervening sovereign jurisdiction between the General Assembly and the people and territory of Namibia, no legitimate governmental authority existed other than the GA.

Interestingly, few of the written statements in the 1971 proceedings, or the debates preceding the adoption of the resolutions, advanced any argument that the SC in fact acted under Chapter VII.<sup>300</sup> Instead, the UN Secretariat continued to apply its wide interpretation of Article 24 of the Charter, as it had done twenty years before in the case of the Permanent Statute for Trieste. There, the Secretary-General had stated that the term "primary responsibility for the maintenance of international peace and security", coupled with the phrase "acts on their behalf", constituted a sufficiently wide legal basis for assuming (temporary) governmental authority, since the UN members had thereby conferred "powers commensurate with its responsibility for the maintenance of peace and security" upon the Council, limited only by the fundamental principles and purposes of the Charter.<sup>301</sup> In the case of Namibia, the restoration of a territory illegally occupied by a rogue administrator into an 'internationalised territory' falling under the direct responsibility of the UN was to be achieved also on the basis of Article 24. As the representative of the SG argued during the pleadings that led to the 1971 ICJ Advisory Opinion, the SC

was acting in the exercise of its powers as defined in Article 24.... [This is] evident from the nature of the violation committed by South Africa of her international obligation, and of the measures which the Council found it necessary to take. Moreover, the intention to create an obligation for States to comply with these measures is evidenced by the fact that, without such powers, their effect may be largely nugatory.<sup>302</sup>

The logic in the argument that seeks to derive the legal basis for Security Council action from "the nature of the violation" that could conceivably only be determined after the capacity of the organ to deal with such 'violation' had been established, is, of course, circular. Nevertheless, it appeared to have impressed the ICJ, which had almost ten years before adopted a similar teleological approach to the question of UN's legal capacities when it opined that "when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated Purposes of the United Nations, the

<sup>299</sup> See *Report of the Secretary-General on the Implementation of S/RES/269*, UN Doc. S/9463/Add. 1 (1969).

<sup>300</sup> The representative of the US said he was able to support the draft resolution "because it wisely does not commit the Council to the narrow path of mandatory sanctions under Chapter VII of the Charter". The UK representative added that "it is well that an original intention to include language of Chapter VII of the Charter has been abandoned. I have already made it clear that my Government is not and will not be prepared to agree to commitments under Chapter VII of the Charter in this regard" (UN Doc. S/PV.1465, pp. 7 and 41 respectively). Only Pakistan suggested that the relevant resolutions would in fact fall under Chapter VII, somewhat unconvincingly contending that South Africa's persistent refusal to withdraw from Namibia would constitute a threat to peace in terms of Art. 39 (ICJ Pleadings 1971, Vol. I, at 357). For an account of the considerable confusion in the minds of UN delegations as to the legal basis upon which the Security Council resolutions were passed see John Dugard, *The South West Africa/Namibia Dispute. Documents and Scholarly Writings on the Controversy Between South Africa and the United Nations* (Berkeley: University of California Press, 1973), at 506-516.

<sup>301</sup> Cf. *supra* note 119.

<sup>302</sup> Written statement of the SG, ICJ Pleadings 1971, Vol. I, at 100.

presumption is that such action is not *ultra vires* the Organization.<sup>303</sup>

Under closer scrutiny, it is not surprising that the Security Council affirmed the validity of GA Resolution 2145, terminating the title to administer territory without reliance on Chapter VII. As demonstrated earlier, the relationship between the administering authority and the supervisory body had always been one of a multilateral contractual nature. Malperformance, or material breach, of the trust by the former would, as a general principle, vest the latter with the competence to terminate the contractual bond without having to determine a threat to international peace and security.<sup>304</sup> This was the argument of the SG's representative who relied heavily on the applicability of the maxim *non adimpleti contractus*.<sup>305</sup> It was precisely the absence of any intervening sovereign jurisdiction, or competing territorial title, and the mere existence of contractual obligations, that enabled the United Nations to invoke Article 24 in support of a theory of a reserve of powers against the will of a non-consenting member state *qua* administering power. The exercise of power involved did not amount to an invasion of national sovereignty precisely because the territory was already vested with international status.<sup>306</sup> Article 24(2) states that the specific powers granted to the SC are laid down in Chapters VI, VII, VIII, and XII and it appears that the ICJ agreed that the Council would not only possess those powers but may exercise such other powers that are necessary for it to discharge its responsibilities,<sup>307</sup> one of which had been to declare South Africa's presence illegal and to restore the more permanent promise of future self-determination.

In what was arguably the most revolutionary feature of the Opinion, the Court found that the Security Council Resolution 276 was legally binding upon states despite the fact that it was not adopted under Chapter VII of the Charter. The reasoning of the Court went as follows:

(1), the SC acted in the exercise of its primary responsibilities, the maintenance of international peace and security, when it adopted Resolution 276.

<sup>303</sup> Advisory Opinion concerning *Certain Expenses of the United Nations*, ICJ Reports [1962] 151, at 168.

<sup>304</sup> On the issue of the revocation/termination of the Mandate on the basis of Article 24 of the Charter compare ICJ Reports 1971, *supra* note 56, at 47, with the separate opinion of Judge de Castro, *id.*, at 216. *Contra*, sep. op. of Judge Fitzmaurice, *id.*, at 266-268. For a general discussion of the Opinion's implications, see Arthur W. Rovine, 'The World Court Opinion on Namibia', 11 *Columbia JTL* 203-239 (1972), at 226 *et seq.*; Oliver J. Lissitzyn, 'International Law and the Advisory Opinion on Namibia', 11 *Columbia JTL* 50-73 (1972), at 65 *et seq.*; John F. Murphy, 'Whither Now Namibia?', 6 *Cornell ILJ* 1-43 (1972), at 28 *et seq.*; Preston Brown, 'The 1971 I.C.J. Advisory Opinion on South West Africa (Namibia)', 5 *Vanderbilt JTL* 213-242 (1971-1972), at 219 *et seq.*; and Herman, 'Namibia', *supra* note 127, at 315-319.

<sup>305</sup> See the Oral statement by the representative of the UN SG, ICJ Pleadings 1971, Vol. II, at 54: "A party which does not fulfil the obligations incumbent upon it and arising from the relationship, cannot be recognised as retaining the rights which it claims to derive from the relationship".

<sup>306</sup> Sep. op. Judge Dillard, ICJ Reports 1971, *supra* note 56, at 163.

<sup>307</sup> Leland M. Goodrich, Edvard Hambro and Anne P. Simons, *Charter of the United Nations. Commentary and Documents* (3<sup>rd</sup> ed., New York, 1969), at 204. In its *Legal Consequences* opinion, the Court held that "reference in paragraph 2 of this Article [24] to specific powers of the Security Council under certain chapters of the Charter does not preclude the existence of general powers to discharge the responsibilities conferred in paragraph 1" (ICJ Reports 1971, at 52). Kelsen would not have agreed with this interpretation for he submitted that "it is impossible to interpret Article 24 to mean that it confers upon the Council powers not conferred upon it in other articles of the Charter" (*United Nations*, 1950, *supra* note 105, at 284).

- (2), the legal basis of the resolution was Article 24(1), which
- (3) does not restrict the SC to the specific powers mentioned in Article 24(2) but
- (4) confers implied 'general powers' upon the Council to discharge its primary responsibility which are
- (5) limited only by the fundamental principles and purposes of the Charter.<sup>308</sup>

According to the Court, it was clear from the wording of the Resolution and the circumstances in which it was adopted that it was intended to be binding upon member states under Article 25:

When the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for Member States to comply with that decision, including those members of the Security Council which voted against it and those Members of the United Nations who are not members of the Council. To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter.<sup>309</sup>

In its final pronouncement on the issue, the ICJ

- (1) advised the Security Council that South Africa's continued presence in Namibia would be illegal, hence confirming the demise of South African authority over the mandate,
- (2) stated South Africa's obligation to withdraw its administration from Namibia to end the occupation,
- (3) found the territory to be under UN jurisdiction,
- (4) affirmed the right of Namibians to self-determination and freedom from *apartheid* which it held to be a massive violation of the human rights of its citizens.<sup>310</sup>

The Court's stance in this context came closer to an authoritative justification for a legislative role for the SC than had yet been propounded by an organ of the UN.<sup>311</sup> As *Higgins* observed, the Court, in what was undoubtedly one of its most important constitutional pronouncements, "appears to be saying that [the GA] can pass resolutions which are legally operative, even if it is necessary to ask for the assistance of the Security Council in making

<sup>308</sup> ICJ Reports 1971, *supra* note 56, at 51-53. This example of an application of the teleological method of interpretation was opposed by five judges. Perhaps overzealously, Judge Gros described it as a modification of the principles of the Charter which would convert the SC into a world government (*id.*, at 340-1). Judge Fitzmaurice insisted that "only when the Council is acting under Chapter VII, will its resolutions be binding on member States. In other cases their effect will be recommendatory and hortatory only" (*id.*, at 293).

<sup>309</sup> ICJ Reports 1971, at 54. Note also the views of Higgins who examined whether Article 25 was intended to apply to decisions taken under Chapter VII after a determination had been made that a threat to the peace existed under Article 39. She supports the conclusion that the S/RES/276 was binding under Article 25, having been validly passed under Article 24 ('The Advisory Opinion on Namibia: Which U.N. Resolutions are Binding under Article 25 of the Charter?', 21 *ICLQ* 270-286 (1972), at 286).

<sup>310</sup> On this issue cf. Henry J. Richardson, 'Self-Determination, International Law and the South African Bantustan Policy', 17 *Columbia JTL* 185 (1978), at 190-93. For a concise overview of the system of discriminatory policies see, e.g., Jost Delbrück, 'Apartheid', in *United Nations: Law, Policies and Practice* (ed. by Rüdiger Wolfrum, 1995), at 27-38.

<sup>311</sup> Rovine, 'Opinion', *supra* note 304, at 229.

them legally effective.<sup>312</sup> While the ICJ did not discuss Resolution 2248 (S-V) or the status of the UN Council for Namibia and provided no guidance on the issue of UN governance of the territory,<sup>313</sup> it had, however, in effect come full circle. The judicial solution of 1950, of instituting a *sui generis* system of international accountability had proven ineffective, as vividly demonstrated by the introduction of *apartheid* into the territory. In its 1971 pronouncement, the ICJ viewed international law as a *function* of the regulative ideas operating in a certain political and social environment, thereby reinforcing a pattern of judicial-political cooperation that had marked the early years of the Namibia dispute. Its criteria for the discharge of international justice were desert (entitlement) and need (being subjected to *apartheid* policy), and it interpreted rules of general international law through this functional prism.

### (iii) THE UNITED NATIONS COUNCIL FOR NAMIBIA

After terminating the Mandate in 1966, the GA attempted to confront the problem of implementing the judgment of the ICJ. It established an eleven-member United Nations Council for South-West Africa,<sup>314</sup> later renamed the UN Council for Namibia (UNCfN).<sup>315</sup> As the executive arm of the Council, the Office of the UN Commissioner for Namibia was responsible for implementing the Council's decisions and engaged in research and information, education, training and welfare programmes<sup>316</sup> as well as the administration of the UN Fund for Namibia.<sup>317</sup> Interestingly, the Council's functions were complemented by the nomination of a Special Representative of the UN Secretary General (SRSG) who was charged to "assist in achieving the aim of self-determination and independence and to study all questions relevant thereto".<sup>318</sup> His functions were framed independently from those of the Council so to allow a separation between administrative tasks and diplomatic negotiation

<sup>312</sup> *The Development of International Law through the Political Organs of the United Nations* (Oxford: OUP, 1963), at 270.

<sup>313</sup> See Lissitzyn, 'Advisory Opinion', *supra* note 304, at 71. Rovine argued that the Court preferred to evade Soviet bloc political opposition to UN administration and the legal problems involved in assessing the effect of decisions made by the UNCfN or by any absent *de jure* UN administration ('Opinion', *supra* note 304, at 234).

<sup>314</sup> A/RES/2248 (S-V), UN Doc. A/6657/Supp.1 (1967). The Council's membership was successively increased to 18 (in 1972), to 25 (in 1974), and to 31 (in 1978). See Nico J. Schrijver, 'The UN Council for Namibia vs. Urenco, UCN and the State of the Netherlands', 1 *LJIL* 25-47 (1988), at 34.

<sup>315</sup> A/RES/2372 (XXII), 12 June 1968, UN Doc. A/6716/Add.1 (1968), reproduced in 7 *ILM* 890 (1968). The General Assembly optimistically set June 1968 as the date by which Namibia should be independent.

<sup>316</sup> A/RES/2248, *supra* note 314, §3. A good overview of the UNCfN wide range of activities is provided by Junius, *UN Council*, *supra* note 226, at 132 *et seq.* as well as by Roberto Barsotti, 'In tema di amministrazione diretta di territori non autonomi da parte dell'ONU: Il caso della Namibia', 16 *Comunicazioni e Studi* 53 (1980), at 63 *et seq.*

<sup>317</sup> The Fund was based on the consideration that the UN incurred an obligation to assist Namibians in their struggle to gain independence, and to that end, to provide them with comprehensive assistance. See Eckart Klein, 'Namibia' in 3 *EPIL* (ed. by Bernhardt, 1997), at 489. Through A/RES/3112 (XXVIII), 12 December 1973, the UN Council for Namibia was appointed trustee of the UN Fund for Namibia (UN Doc. A/9030 (1973)).

<sup>318</sup> S/RES/319 (XXVII), 1 August 1972, §5 in accordance with which the SRSG was appointed on 24 September 1972. See the *Report of the Secretary-General on the Implementation of SCR 319* (1972), 15 November 1972, UN Doc. S/10832, Annex II, in D.J. Djonovich, *United Nations Resolutions*, Vol. IX, 1972-1975 (New York 1990), 125. The 'Commissioner for Namibia' was appointed by the UN GA. His functions and those of the Special Representative were later merged within the framework of the settlement proposal approved by S/RES/431 (1978). Cf. Schrijver, 'Urenco', *supra* note 314, at 33.

with a view to exploring possible avenues to break the deadlock.

The establishment of the Council of Namibia was a late result of the operationalisation of the two principles on which the Mandate system was initially founded: the permanent right of self determination of peoples and, second, the principle of non-annexation of the territories. To that effect, the Council was charged with the task of administering the territory until independence and the complementary legislative authority to "promulgate such laws, decrees and administrative regulation as are necessary for the administration of the Territory until a legislative assembly is established following elections conducted on the basis of universal adult suffrage".<sup>319</sup> The GA Resolution also directed the SC to "take all appropriate measures to enable the [UNCfN] to discharge the functions and responsibilities entrusted to it by the General Assembly".<sup>320</sup> The novelty of the legal form chosen to operationalise those two principles in the case of Namibia can hardly be overstated:

Per la prima volta, l'ONU ha espresso la precisa volontà di amministrare un Territorio non autonomo *in contrapposizione* allo Stato amministratore, e per la prima volta l'Organizzazione dispone di strumenti giuridici idonei a consentirle l'esplicazione di poteri *effettivamente anti-gonistici* rispetto a quelli statali.<sup>321</sup>

As Goy convincingly argued with reference to South Africa's illegal occupation and the Council's activities, Namibia had been subject to a 'double dependency' under two competing authorities: one exercising effective control within the territory, the other exercising control of 'external power'.<sup>322</sup> As a result, the Council was, from its inception, faced with the problem that it had to operate as a kind of government in exile. Reflecting upon its tenure, one of its more successful activities consisted in its quest to represent the territory on the international plane, hence seeking membership in various UN specialised agencies.<sup>323</sup> Following a request to the SG to assist the Council to secure representation "on behalf of the Namibian people" at discussions relating to major conferences and organisations<sup>324</sup> the GA requested all UN specialised agencies and organisations "to grant full membership to the United Nations Council for Namibia so that it may participate in that capacity as the legal Administrative Authority for Namibia in the work of these agencies, organisations and conferences."<sup>325</sup> In a subsequent resolution, the GA declared that membership of the UNCfN in the specialised agencies and other organisations and bodies within the UN system "is an indispensable element in the fulfilment of the responsibilities of

<sup>319</sup> A/RES/2248 (S-V), *supra* note 314, pt. II(b).

<sup>320</sup> *Ibid.*, pt. IV, §5.

<sup>321</sup> Barsotti, 'Amministrazione diretta', *supra* note 316, at 132 (emphasis in the original).

<sup>322</sup> Raymond Goy, 'L'indépendance de la Namibie', 37 *AFDI* 387-405 (1991), 387-89.

<sup>323</sup> See UN Council for Namibia, *Excerpts from Report to General Assembly, 28 October 1971*, §V(b) (Proposal for future action by the Council), UN Doc. A/8424, reproduced in 11 *ILM* (1972), 80. The Council also sought to be substituted for South Africa as a party to multilateral treaties, planned to draft interim laws and suggested to register, and levy taxes on, all persons and corporations doing business in Namibia. It was even prepared to establish a judicial body to review 'quasi-judicial decisions' of administrative officials and tribunals in the territory.

<sup>324</sup> *Recommendations from the Report of the UN Council for Namibia*, UN Doc. A/9024, §27, reproduced in 13 *ILM* 452 (1974).

<sup>325</sup> A/RES/32/9E, 4 November 1977, UN Doc A/32/45 (1978). This resolution was preceded by a similarly worded resolution A/RES/31/149, 20 December 1976, requesting agencies "to consider favorably granting a waiver of the assessment of Namibia while it is represented by the United Nations Council for Namibia".

the international community towards the people of Namibia".<sup>326</sup>

The hurdles on the way to representation of a non-state territorial entity on the international plane by the subsidiary organ of the GA, were however easy to detect: membership in such bodies is regularly accorded to 'States'<sup>327</sup>, 'countries'<sup>328</sup> or 'nations'.<sup>329</sup> It seems evident from the international character of its functions and responsibilities that the UN Council operated on the international plane but it certainly did not possess the positive attributes of a 'state', 'country' or 'nation'. Could Namibia, because of its international status, be treated as an entity *sui generis* for purposes of admission to full membership of international organisations?<sup>330</sup> The ideas developed in the context of the ICJ's 1971 Advisory Opinion appeared to have been taken a step further in what can be termed a radically functionalist interpretation of membership criteria in international organisations. While the issue of permanent population and defined territory did not present stumbling blocks to accession, the territory certainly had no government that exercised effective control over it.<sup>331</sup> However, inter-state fora have not always adhered to the principle of effective government when deciding on the representation of members.<sup>332</sup> Namibia, so the argument went, possessed an agent of necessity that was authorised by the GA to assume certain governmental functions and the capacity to enter into relations with other states. Even though the Council lacked the admini-

<sup>326</sup> A/RES/S-9/13, 3 May 1978, §24. A decade later, the GA would reiterate its request to all specialised agencies to grant full membership to Namibia, represented by the Council. See A/RES/42/14, 6 November 1987, C §10 *et seq.* The politically symbolic step of formally recognising SWAPO as the 'authentic representative of the Namibian people' by A/RES/3112 (*supra* note 317) will not be extensively discussed here. The acknowledgement and support of the GA did not confer upon SWAPO the status of the legal authority over the territory (*cf.* Malcolm N. Shaw, 'The International Status of National Liberation Movements', 5:1 *Liverpool LR* 19-34 (1983), at 31 and 33). Whereas the GA formally requested that UN agencies grant the UN Council full membership status, the GA did not make a similar request for SWAPO. Nor did the GA establish a hierarchy between it and the UN Council for Namibia. Instead, A/RES/3295 (XXIX), 13 December 1974, UN Doc. A/9631 (1974), requested that both the Council and SWAPO be allowed to participate in conferences where their rights and interests were involved. The Council and SWAPO were allowed to participate as separate entities in the proceedings of international organisations such as the ILO, the WHO, the FAO, and the UNESCO. See Ebere Osieke, 'Admission to Membership in International Organisations: The Case of Namibia', 51 *BYIL* 189-229 (1980), examining the far-reaching implications for the law of international organisations in the light of the legal status of the UN Council for Namibia, at 196 note 1, as well as Sushma Soni, 'Regimes for Namibia's Independence: A Comparative Study', 29 *Columbia JTL* 563-600 (1991), at 581-583.

<sup>327</sup> Articles III and IV of the UN Charter; Articles III and IV of the Charter of the OAU; Article I(2) of the Constitution of the ILO; Articles III, V and VI of the WHO Constitution; Article IV of the Statute of the Council of Europe; Article II(2) of the UNESCO Constitution (but see also Article II(3) which stipulates that '[t]erritories...which are not responsible for the conduct of their international relations may be admitted as Associate Members..., upon application made on behalf of such territory...by the Member or other authority having responsibility for their international relations'); Article IV of the IAEA Statute; Article XI(2) c) and d) of the IDA Articles of Agreement.

<sup>328</sup> *Cf.* the Articles of Agreement of the IMF (Article II (1 and 2)); of the IBRD (Article II(1)); and of the IFC (Article IX(2) c) and d)).

<sup>329</sup> Article II(1) as well as Annex 1 of the FAO Constitution. For wider survey of the modalities of non-autonomous territories' representation in international life see Robert Kovar, 'La participation des territoires non autonomes aux organisations internationales', 15 *AFDI* 522-549 (1969).

<sup>330</sup> For a general discussion see Osieke, 'Membership', *supra* note 326, at 189 *et seq.* and Ralph Zacklin, 'The Problem of Namibia in International Law', 171 *RCADI* 233-340 (1981-II), at 313 *et seq.*

<sup>331</sup> Apart, of course, from the illegal South African government. For an examination of the criteria and elements of statehood see James Crawford, 'The Criteria of Statehood in International Law', 48 *BYIL* 93-182 (1976-77) as well as his seminal *Creation of States*, *supra* note 35, at 31-76.

<sup>332</sup> *Cf.* Higgins, *Development of International Law*, *supra* note 312, at 166.

strative structures and capacity of a state, UN organisations eventually admitted Namibia, represented by the Council, into associated<sup>333</sup> and even full membership,<sup>334</sup> despite provisions under which non-independent territories could only be admitted only as Associate Members.

The legal fiction at work through which access to the international plane was secured by an international organ acting as a territorial government was perhaps best summarised by the ILO Subcommittee that was charged with evaluating the capacity of Namibia for membership: "Until the present illegal occupation of Namibia is terminated, the United Nations Council for Namibia, established by the United Nations as the legal administering authority for Namibia empowered, *inter alia*, to represent it in international organisations, *will be regarded as the Government of Namibia for the purpose of the application of the Constitution of the Organisation*."<sup>335</sup>

The legal fiction of recognising the Council in its two roles – both as the legitimate government of the territory and as the policy-implementing subsidiary organ of the GA – continued to operate in the framework of the internal workings of UN organs until 1990.<sup>336</sup> In addition, the Council was also permitted to participate in both the UN Conference on the Succession of States in Respect to Treaties (1977)<sup>337</sup> and the Third UN Conference on the Law of the Seas (UNCLOS III, 1973-1982) where its delegation was seated with state delegations and its written statements distributed by the Secretariat.<sup>338</sup> The ratification of the UN Convention on the Law of the Sea by the Council<sup>339</sup> represents a remarkable example of such representation that had been endorsed by the GA on a permanent basis.

Although the UN Council could not directly administer the territory, it did carry out some of

<sup>333</sup> WHO; see Osieke, 'Membership', *supra* note 326, at 206-7.

<sup>334</sup> FAO (14 November 1977) and ILO (23 June 1978). The President of the UN Council for Namibia requested the admission of the territory as a member of UNESCO on 15 August 1978; UNESCO's Executive Board decided to recommend to the General Conference to admit Namibia (Cf. UNESCO, *Decisions Adopted by the Executive Board at its 105<sup>th</sup> Session* (Doc. 105 EX/Decisions, Paris, 28 December 1978), item 9.3. Cf. also Osieke, 'Membership', *supra* note 326, at 208 and 215 *et seq.* respectively as well as Zacklin, 'Problem', *supra* note 330 at 318. Full membership of Namibia (represented by the UNCfN) ensued in UNCTAD, UNIDO, ITU, IAEA and the Executive Committee of the UNHCR (Junius, *UN Council*, *supra* note 226, at 176).

<sup>335</sup> International Labour Conference, 64<sup>th</sup> Session (1978), Provisional Record, No. 24, 19-20 (my italics), quoted by Ebere Osieke, *Constitutional Law and Practice in the International Labour Organisation*, (Dordrecht/Boston/Lancaster: M. Nijhoff, 1985), at 24, as well as in his 'Membership', *supra* note 326, at 214-215.

<sup>336</sup> For the participation of the President of the Council for Namibia in the meetings of the Security Council see, e.g., SCOR (XXVII), 28 January 1972. The GA dissolved the UNCfN on 11 September 1990 (A/RES/44/243A, UN Doc. A/44/PV.96) while it decided that the UN Fund for Namibia should continue to operate under the custody of the SG.

<sup>337</sup> See Osieke, 'Membership', *supra* note 326, at 201 *et seq.*

<sup>338</sup> Cf. *ibid.*, at 205 as well as Schermers/Blokke, *International Institutional Law*, *supra* note 268, at §75. For details of the participation of the UN Council for Namibia at the UN Water Conference (14-25 March 1977), World Conference for Action Against Apartheid (22 July-6 August 1977), the UN Conference on Desertification (29 August-9 September 1977) and the 7<sup>th</sup> Session of the UN Conference on the Standardisation of Geographical Names (17 August-7 September 1977), see *Report of the UN Council for Namibia*, GAOR (XXXII), vol. 1, Suppl. No. 24 (A/32/24 (1977)), at 17 and 20-21.

<sup>339</sup> UN Doc. A/CONF.62/122, 10 December 1982. The UN Council ratified the Convention as early as April 1983 to "protect Namibia's rights over its extensive territorial sea and littoral, which are rich in marine resources" (*Annual Report of the UN Council for Namibia* (1983), UN Doc. A/38/24 (1983), §581).



the normal functions of an administering authority. Through the UN Fund for Namibia, created in 1970 to finance its activities, the Council helped Namibian refugees, organised training programmes and established an emergency program of economic and technical assistance. In its representative and administrative functions, the Council also exercised its competence to issue travel and identity documents, as conceded by GA Resolution 2372 (XXII).<sup>340</sup> In a *note verbale* on 12 December 1968 addressed to the Permanent Representatives of the UN Member States, the SG requested UN member states to accept as valid the travel and identity documents issued by the Council to Namibians abroad.<sup>341</sup> The Council also opened liaison offices in various East African countries.<sup>342</sup> Secondly, on the legislative plane, the adoption of the Decree No. 1 on the Natural Resources of Namibia by the UN Council on Namibia in September 1974 caused a novel situation in which the source of municipal and international normative space appeared to merge in one body.<sup>343</sup>

When the United Nations finally arrived in Namibia in 1989, the Resolution mandating UNTAG with the authority to supervise and control the process by which Namibia would elect its assembly, was already more a decade old.<sup>344</sup> The protracted struggle for Namibia's independence showed however that the international system was prepared to apply novel rules to a unique situation in which no intervening sovereign claim stood between the collective entitlement to self-determination and international territorial administration.

#### RÉSUMÉ: HEIGHTENED INTERNATIONAL AUTHORITY AND THE 'PEOPLES' AS A NEW ACTOR

The first two chapters of this thesis aimed at drawing dialectical counter-images of the notion of 'suspension' of sovereignty. The analysis gradually shifted from a static ownership-based view to one that conceives of a trustee as internally bound in the performance of trust – hence segregating this obligation from *jura in rem* – and eventually to an appreciation of the revolutionary ICJ ruling of 1971 that gave effect to a functional understanding of the inherent properties and promises of fiduciary administration. In the wake of suspended sovereignty, we emphasised that the UN regime devised for Namibia resembled a more structured

<sup>340</sup> "The Council shall continue with a sense of urgency its consultations on the question of issuing to Namibians travel documents enabling them to travel abroad" (A/RES/2372 (XXII), 12 June 1968, reproduced in 7 *ILM* (1968), at 890).

<sup>341</sup> UN Doc. A/AC.131/10 (1969) which also reproduces the replies of governments. Cf. also J.F. Engers, 'The United Nations Travel and Identity Document for Namibians', 65 *AJIL* 571-78 (1971), at 574 *et seq.* The recognition of travel documents issued by the Council was finalised in various exchanges of letters between the UN Commissioner for Namibia and government representatives. Cf. UN Council for Namibia, *Agreements with African Countries for Issuing Travel and Identity Documents to Namibians* (July 1970), reproduced in 9 *ILM* (1970), at 1218 *et seq.* See also Junius' discussion of the issuance of travel documents as an instance of the dual capacity of the UNCfN in *UN Council*, *supra* note 226, at 194-199.

<sup>342</sup> The establishment of these offices was authorised by the GA as a consequence of its adoption of operative §7 of A/RES/2517 (XXIV), 1 December 1969, UN Doc. A/7798 (1969).

<sup>343</sup> This specific instrument will be discussed below in Chapter IV.3.1, *infra* p.137, in the context of the functional duality of international territorial administrations.

<sup>344</sup> S/RES/435 (XXXII), 29 September 1978, 2087<sup>th</sup> meeting, UN Doc. S/RES/435 (1978). The position of UNTAG was, however, not derived from the competencies of the UN Council for Namibia (which would have been legally sound as it had already assumed the powers to administer the territory). Instead, the UN tacitly accepted the *de facto* effective control of South Africa. See Hufnagel, *Friedensoperationen*, *supra* note 104, at 60-61. For accounts of post-independence involvement of the UN see Roger Hearn, *UN Peacekeeping in Action: The Namibian Experience* (1999); Laurent C.W. Kaela, *The Question of Namibia* (London: MacMillan, 1996), and Lionel Cliffe, *The Transition to Independence in Namibia* (Boulder/London: Lynne Rienner, 1994), at 115 *et seq.*

version of the League's mandate system while also assigning ultimate responsibility for territories to the international community.

Following a temporal trajectory, we started our inquiry into the nature of non-state territorial entities under the control of a fiduciary administration by introducing the novel ideas underpinning the establishment of the Mandate System at Versailles. The political shocks that had reverberated through the international system following the catastrophe of WWI prompted not only changes in its 'operative system' – the creation of processes and structures – but also included corresponding transitional changes in its normative sphere. As *Angie* observes, it was within the space created by the absence of sovereignty that authorities could proceed to extend and refine the 'civilising mission' by means of a new science of administration.<sup>345</sup> The institution of the Mandate, as discussed in the present chapter, did not confer 'sovereignty of permanent rights' in a patrimonial understanding, but consisted of a conditional grant of powers for the *achievement of a purpose* – not for the benefit of the grantee but for the benefit of a third party, a newly constituted actor, the 'peoples'.

With *Berman*, we suggested that in such periods of turbulent transition international law reached beyond its basis and placed itself within a transitional paradigm in which the abstract dichotomy between sovereignty and self-determination appeared temporarily suspended and in which new sets of rules found their appropriate context. The hiatus in the application of general rules of international law and the introduction of novel rules – inspired as they were by a fiduciary understanding of administration – can thus be explained by the conversion of two entities, sub-state (the 'peoples') and supra-state (a global organisation) that lacked the intermediate level of state sovereignty to which classical rules had so far applied. This conversion will, in the course of the next chapter, be interpreted as the result of a singular alliance between international legal modernism and nationalism.

What, exactly, had the UN representative, speaking in the context of the 1971 ICJ Pleadings, meant when he referred to Namibia as territory which had "for the past 50 years, possessed *sui generis* international status, not being under the sovereignty of any State, and having been placed under the overall authority and protection of the international community, represented since 1946 by the United Nations"?<sup>346</sup> An attempt to answer this question leads us directly into the concept of subjectivity, and henceforth of partial personality, in international law. The following two chapters thus introduce further criteria that complement the matrix according to which we capture the status of UN-administered non-state territorial entities in public international law. The first criterion (Chapter III) refers to the relationship of agency between an international administration and the people under its temporary tutelage. The second criterion (Chapter IV) concerns the relation between such an administration and its mother organisation which we term 'organic'. This second criterion supplies a fundamental means to distinguish properly 'internationalised' territories from, firstly, other instances in which *imperium* is divorced from *dominium* (protectorates, neutralised zones and leases, as discussed in Chapter I) and, secondly, from fiduciary arrangements under the Mandate- and Trusteeship systems where *sovereign states*, and not international organs, were bound by fiduciary obligations. The extent to which a territory is directly submitted to international law

<sup>345</sup> *Angie*, 'Heart', *supra* note 196, at 496.

<sup>346</sup> Oral statement, ICJ Pleadings 1971, vol. II, at 35.

will be introduced as a third criterion used to categorise the anomalies emerging from a divorce between sovereign title and temporary jurisdiction by an international organ. The notion of *Völkerrechtsunmittelbarkeit* means that a UN-administered territorial unit is, though not sovereign, exclusively subject, without the intervention of any other state entity, to international norms and those created by the international organ administering it. We apply this notion in Chapter IV as we analyse the normative content of legal pronouncements of the UN Council for Namibia which was formally in charge of administering the territory after South Africa had 'disowned' the League's Mandate.



### CHAPTER III

## SELF-DETERMINATION AND THE LEGAL PERSONALITY OF INTERNATIONALISED TERRITORIES

The first and second chapter of this thesis sought to account for the phenomenon of 'suspended sovereignty'. The first chapter supplied an *in rem* frame to explain the divorce between legal title to territory and jurisdiction over it while the previous chapter accounted for the suspension of the application of general rules of international law and the introduction of novel rules that regulated the operation of the Mandate and Trusteeship systems. It applied McNair's and Berman's conception of the transitionality of legal norms in which rules were grounded in a new 'essential basis'. This chapter begins with a re-appraisal of the concept of collective entitlement to realise what has earlier been described as the 'permanent promise' of fiduciary administration – that of internal and external self-determination. Administration by trust will thus be presented as a reaction to a general challenge to international law's normative foundation. In more metaphorical terms, the content of this promise points to the eventual return of 'the sovereign' disguised in garments spun by the machinery of self-determination. Her return in the *Gestalt* of the 'peoples' – an international actor newly constituted by the UN Charter – not only ends the hiatus created by the de-sovereignising principle of trust. As a dynamic principle designed to end colonialism, it also had a profoundly threatening impact on the configuration of nation states as such – ill-prepared, as they remain, for an increasingly empowered tribalism that relies on the second, stable promise of territorial sovereignty. The purpose of the following sections is to briefly examine those catalysts which appeared to have displaced notions of sovereignty and regulated their temporary substitution.

As we know, there has hardly been any progress in finding doctrinal consensus on the treatment, in public international law, of quasi-governmental authority.<sup>347</sup> This chapter offers key elements essential to determining the status of a non-state territorial entity in public international law. Building on the conclusions drawn from the discussion in the previous two chapters, we suggest here that with regard to territories under international tutelage, simplistic conceptions of the international legal system, in which a territory either was or was not under the complete sovereignty of a state, are disputable. In discussing whether non-state territorial entities can acquire (derivative) international legal personality based on considerations of functional necessity, we will adopt a normative perspective on the concept of internationalisation, and limit our research interest to an inquiry into the nature of entities administered by an internationally mandated organ. In order to methodologically complement our discussion of fiduciary administration, this chapter introduces an inseparable concept to capture the nature of the relationship between a non-state territorial entity and its administration: that of agency. What will eventually be of key interest is the question of how a theory of partial legal personality based on the concept of agency could provide a more refined normative framework within which UN-administered territories can be located.

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<sup>347</sup> For an account of arguments in favour of the (partial) legal personality of *de facto* regimes cf. Michael Schoiswohl, *Status and (Human Rights) Obligations of Non-Recognised De Facto Regimes in International Law. The Case of 'Somaliland': State Collapse, Secession, Non-Recognition and Human Rights*, (Ph.D. on file with the University of Vienna, 2001), 174 *et seq.*

# INTRODUCTION: INTERNATIONAL LAW'S AGNOSTICISM

Self-determination, operationalised by temporal fiduciary administration of peripheral territories, acquired a distinct significance as the concept's penumbra of uncertainty came to be exploited. Indeed, as *Bain* argues, the passing of GA Resolution 1514 (XV)<sup>348</sup> and its repudiation of any test of preparedness for independence dealt a fatal blow to the legitimacy of trusteeship: "The right of self-determination transformed trusteeship into nothing less than a crime against humanity."<sup>349</sup> Whereas membership in international society prior to decolonisation admitted the conditional reasoning of trusteeship, post-colonial international society excluded considerations of a state's ability and willingness to fulfil the obligations of statehood; the "discourse of 'fitness' was therefore no longer intelligible in international life."<sup>350</sup>

Issues of self-determination, *Berman* reminds us, arise in unusual temporal and spatial gaps in the international legal system. As a result of a set of circumstances – political, historical, ideological – sovereignty is temporarily called into question and, with it, the functioning of the legal order as such.<sup>351</sup> The right to self determination, formulated as a claim by a 'people' to control its own destiny (albeit held in check and supervised until it met the criteria established by the Mandatory and Trustee powers) emerged out of two devastating wars when the international legal system was at its weakest. As a demand that confronted the positivist acceptance of sovereignty's claim to representation, self-determination would be channelled through the two universal institutions that sought to reconstruct international society after the two world wars. These two collective systems were themselves vehicles to mediate between competing representation claims based on a rational-liberal vision of individuals united in states on the one hand, and group identity on the other.

The confrontation between normative bases of law that contributed to the limited suspension of the normal operation of legal norms ultimately directs us back towards the complementarity of self-determination and sovereignty. In this binary conception of international legal principles that portrays normativity as an interface for static and dynamic principles, self-determination would, as a revolutionary concept born out of an intrinsic belief in the value of overcoming mandatory tutelage, and based on the faith in the legitimacy of the international community's culturally evaluative and transformative authority,<sup>352</sup> eventually be utilised by a much wider class of 'subjects' than originally envisaged. In the hands of those vying for recognition, self-determination presented itself as a claim to redefine the 'self' based on notions of popular sovereignty, "elevated to the obsessive and passionate preoccupation of rulers".<sup>353</sup> The revolutionary character of such an unrestrained notion of self-determination – in the guise of micronationalism that feeds on the tenets of political philosophy underpinning the permanent promise of territorial sovereignty – threatened to overload the self-identifying

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<sup>348</sup> *Infra*, p. 370

<sup>349</sup> *Bain*, *Anarchy*, *supra* note 18, at 134.

<sup>350</sup> *Ibid.*, at 135. On the abandonment of the criteria of effectiveness in the decolonisation of sub-Saharan Africa see particularly Gerard Kreijen, *State Failure, Sovereignty and Effectiveness* (Leiden: M. Nijhoff, 2004), at 171 *et seq.*

<sup>351</sup> *Berman*, 'Abeyance', *supra* note 218 at 58.

<sup>352</sup> Nathaniel Berman, 'Beyond Colonialism and Nationalism? Ethiopia, Czechoslovakia, and "Peaceful Change"', 65 *Nordic JIL* 421-479 (1996) at 424.

<sup>353</sup> Georges A.J. Scelle, 'Obsession du territoire', in *Symbolae Verzijl* (The Hague, 1958), at 361.

capacity of the available social systems.<sup>354</sup> Seeking to conceptualise the charismatic principle of self-determination, international society was therefore confronted with an especially difficult problem.

True, emerging human rights norms provided moral resources for the de-legitimisation of colonialism, opened the valves for the proliferation of new sovereigns in the developing world, and contributed to the growth of international society since the end of the Cold War.<sup>355</sup> Yet not only did the nationalisation of self-determination place a "time bomb under the concept of empire as a legitimate political form",<sup>356</sup> secession would also tend to beget secession in a chaotic mitosis.<sup>357</sup> The return of the sovereign narrative entailed a statist 'obsession with territory' on the part of communities striving for independent statehood, against which Scelle opposed the need for a gradual trend towards integration into a universal federal society and the appearance of actual solidarity.<sup>358</sup> As a direct consequence of the 'de-sovereignising' operation of trust, and its underlying principle of self-determination in the normative sphere, the 'bodily' or proprietary conception of territory was reinforced in the hearts and minds of people relying on, and taking inspiration as well as determination from, this more permanent *promesse étatique*. While in extraordinary circumstances the complementarity of law and sovereignty might be suspended, self-determination remained teleologically directed towards the reconstitution of the latter.

In turning the ideas of the West against the West,<sup>359</sup> the application of the self-determination doctrine not only proved its potential to destabilise the international normative framework and operate in the gap of sovereignty. The doctrine also expected international legal institutions to determine the 'self' in order to locate and delimit the holder of sovereign title, and secondly, to discharge functions of impartial arbitration between competing sovereigns. In the process, the international community's legal competence to distinguish between 'authentic' and 'specious' claims of self-determination was heightened as it was pushed to develop objective indicia to define the particular authentic units that would be entitled to process such an identification of the underlying 'self'. The international community has accorded a varying degree of political recognition to such claims, but has done so in a somewhat haphazard manner.<sup>360</sup> The history of international arbitration between competing claims over territory and population, carved out in a succession of pronouncements beginning with the *Aaland Islands* dispute, via the *Namibia* case, the *Western Sahara* opinion and the *East*

<sup>354</sup> Philip Allott, 'Self-Determination – Absolute Right or Social Poetry', in *Modern Law of Self-Determination* (ed. by C. Tomuschat, M. Nijhoff, 1993), at 177. See also Ernst Gellner, *Nations and Nationalism* (Cornell University Press, 1983), at 2.

<sup>355</sup> Christian Reus-Smit, 'Human Rights and the Social Construction of Sovereignty', 27 *Review of International Studies* 519 (2001), at 520.

<sup>356</sup> Cf. James Mayall, '1789 and the Liberal Theory of International Society', 15 *Review of International Studies* 297-307 (1989).

<sup>357</sup> Daniel Philpott, 'Self-Determination in Practice', in *National Self-Determination and Secession* (ed. by M. Moore, OUP, 1998), at 91.

<sup>358</sup> Scelle, 'Obsession', *supra* note 353, at 357-358.

<sup>359</sup> Hedley Bull, 'The Revolt Against the West', in *The Expansion of International Society* (ed. by H. Bull and A. Watson, Oxford: Clarendon Press, 1984), at 222.

<sup>360</sup> Gerry J. Simpson, 'The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age', 32 *Stanford JIL* 255 (1996), at 259. See also the instructive study of 'recognition contests' and the credentials controversies by Brad R. Roth, *Government Illegitimacy in International Law* (Oxford: Clarendon Press, 1999), in chapters 7, 8, and 9.

*Timor dictum*, gives a vivid account of the heightened role of international authority that attempts to determine the extent of rights of territorial entities to attain legal status. A re-conceptualisation of self-determination is therefore closely intertwined with the ascendance of international law that is called upon to mediate proprietary disputes over ownership of the 'self'.<sup>361</sup>

These observations emphasise that post-colonial public international law left the dichotomy of territorial integrity and self-determination intentionally unresolved. Indeed, not only was the dichotomy left unresolved, it was also wrapped in a tautology, making the realisation of the entitlement as inaccessible as possible. Since the definition of 'peoples' was not fixed independently of the entitlement to self-determination, a community is certifiable as 'people' only once it is ascertained to possess this entitlement.<sup>362</sup> For *Berman*, this tautology represents the result of a rupture created by the conceptual confrontation of complementary ideas – "the positive and normative elements of legal authority, the subjective and objective components of national identity".<sup>363</sup> International law, therefore, appears agnostic, and rather than taking sides, it must be concerned with the restoration of normative harmony and regulating and mitigating "in a humanitarian fashion the effects of postmodern tribal secessionism" that attempts to create political identity out of an ethnic affiliation.<sup>364</sup>

It is this dichotomy that will implicitly underpin the remaining discussion of the thesis. The following exposé investigates the normative underpinning through which international law addresses the 'self' of a particular entity, elevating it to a partial subject of international law. The case study on Kosovo, presented in Chapter V, illustrates on the other hand how international legal institutions are reluctant to properly adjudicate claims that contest the normative space between sovereignty and self-determination. In the same chapter, the thesis will also critically assess the new approach of 'earned sovereignty' and argues that it fails to mediate this ever-present dichotomy. Focusing on an 'open-ended institution-building mandate, Chapter VI then demonstrates that international authority is liable to undergo a process of de-legitimisation as it declines to determine the 'future status' of an internationalised territory.

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<sup>361</sup> Simpson, 'Diffusion', *supra* note 360, at 261. Cf. also Berman's interpretation of the ICJ's adjudicatory role in weighing the two cardinal principles of GA Resolution 1514 – self determination and territorial integrity – in the *Western Sahara* opinion ('Abeyance', *supra* note 218, at 99-104).

<sup>362</sup> Cf. Roth, *Government Illegitimacy*, *supra* note 360, at 201.

<sup>363</sup> 'Abeyance', *supra* note 218, at 104.

<sup>364</sup> Thomas M. Franck, 'Postmodern Tribalism and the Right to Secession', in *Peoples and Minorities in International Law* (ed. by C. Brölmann, R. Lefeber, and M. Zieck, 1993), at 12. For an analysis of the polarity of territorial integrity and the right of secession see David B Knight, 'Territory and People or People and Territory? Thoughts on Postcolonial Self-Determination', 6 *International Political Science Review* 258-272 (1985). The ambiguity permeating international law's treatment of self-determination with respect to secessionist claims is also well discussed by Michael Eisner, 'A Procedural Model for the Resolution of Secessionist Disputes', 33:2 *Harvard ILJ* 407-426 (1992).



### 3.1 SUBJECTIVITY AS ENTITLEMENT

The discussion presented in this chapter proceeds in three stages. The following section will account for the dynamic principle of self-determination, how it relates to the establishment of an objective international regime such as an international administration, and how it provided subjectivity to the 'peoples' concerned. This first approach is inductive in the sense that it seeks to infer a certain legal status from a set of abstract collective entitlements provided by the international legal community. In his study on Mandates, *Wright* concluded:

While ordinarily rights under international law vest only in states, it appears that the mandated peoples have a status, withdrawing them from the sovereignty of any state and giving them the opportunity to invoke the direct protection of the League, which makes it not inappropriate to speak of them as enjoying rights under international law correlative to the duties imposed by the mandates upon the mandatories for their benefit.<sup>365</sup>

The exposé will follow *Wright* and others who argued that the Mandate system not only undermined static notions of sovereignty, but had further consequences for the concept of 'personality' in international law. Hence, the main thrust of the following section consists in the argument that the claim to partial legal personality in international law by non-state territories under fiduciary administration is, since Versailles, becoming increasingly plausible. Indeed, we suggest that an overwhelming trend points to ever more differentiated categories of legal participants being recognised as 'subjects' or given some other form of effective label or standing under international law.<sup>366</sup> The second section is devoted to the concept of agency and interrogates the function of an international agent representing those rights on the international plane. There, the argument will be that a territory administered by the United Nations can, for the period of its administration, base its aspirations towards representation on the international plane on a legal argument. Building on these two argumentative stages, we conclude by striking a synthesis between international entitlement and international representation. We do so by outlining, in fact deriving, a functionally limited legal capacity of territories under international administration from the performative practice of its international agent, as implicitly recognised by other persons of international law. While a fully fledged person of international law traditionally enjoys full legal capacity to take part in international life, a person with such limited capacity "*ont, de par leur but limité, des compétences restreintes*."<sup>367</sup>

#### 3.1.1 THE DYNAMIC PRINCIPLE OF SELF-DETERMINATION

The first part of this discussion represents a constitutive element in our overall argument that seeks to construct partial legal personality from the notion of international entitlement. We submit that the discourse on collective rights, as abstractly formulated as they had initially been with regard to the principle of self-determination, is directly relevant to the discussion of aspects of internal as well as external self-determination of internationalised territories.

<sup>365</sup> *Mandates*, *supra* note 27, at 457.

<sup>366</sup> Henry J. Richardson, 'Constitutive Questions in the Negotiations for Namibian Independence', 78 *AJIL* 76-120 (1984), at 117.

<sup>367</sup> P. Cahier, *Etudes des accords de siège entre les organisations internationales et les Etats où elles résident* (1959), at 42.

Ever since its formulation in 1919, the right of national self-determination has historically had two main zones of application: the first accorded independence to nations in Central and Eastern Europe which had previously been contained within dynastic empires but whose aspirations to statehood had been fuelled by nineteenth century romantic nationalism. In its second sphere of application it helped to accelerate the independence of the former colonies of the European empires at the periphery of the international system in the wave of 'anti-imperialist struggles' in the decades following WWII. In this period, the principle's range had been tailored back to a particular historic context and applied so as to allow the inhabitants of former colonies to take over pre-existing political units as independent states in accordance with *uti possidetis iuris*.

The formulation of the principle in the international normative sphere in this second zone of application lacked normative content as it was offset by the continued operation of the principle of sovereign equality and its specific formulation of a correlative duty to respect existing states' territorial integrity. The continuous pronouncement by the GA of the 'legal standard' of self-determination acquired, however, enormous symbolic importance as it concretised a new political conception, the repudiation of colonialism. Most of the time, as *Franck* writes, this accommodation between territorial integrity/*uti possidetis* and self-determination worked reasonably well. Both notions were doctrinally synthesised and constructed as aspects of the same right: peoples entitled to self-determination were defined as inhabitants of a colony and the realisation of their entitlement was to occur within the colonial boundaries, which would remain sacrosanct, unless the people within those boundaries freely elected to change them by integrating with another state.<sup>368</sup>

Attempting to implicitly limit its function to the context of decolonisation, the ICJ referred to the "*principle* of self-determination as a right of peoples, and its *application* for the purpose of bringing all colonial situations to a speedy end".<sup>369</sup> According to Resolution 1514,<sup>370</sup> a substantive right would accrue to groups which had been subject to a particular historical form of subjugation, hence constituting them as potential subjects of international law that would obtain access to the international plane to assert their claims. This doctrinal consensus operated as a brake to contain the spread of rights within its immediate historic context until the 1966 *International Covenant on Civil and Political Rights* incorporated the right to self-determination in its very first article.<sup>371</sup> In effect, the ICCPR established a permanent link between self-determination as an abstract 'principle' that fuelled the process of breaking the link between overseas colony and metropolitan power, and self-determination as a collective human right. Self-determination henceforth encompassed a continuously exercisable right of 'peoples' to partake in the internal decision-making process of a political

<sup>368</sup> *Franck*, 'Postmodern Tribalism', *supra* note 364, at 9.

<sup>369</sup> *Western Sahara* opinion, ICJ Reports [1975] 12, at 31 (emphasis added).

<sup>370</sup> *Declaration of the Granting of Independence to Colonial Countries and Peoples*, A/RES/1514 (XV), 14 December 1960.

<sup>371</sup> Cf. also the (identical) Article 1 of the 1966 *International Covenant on Economic, Social and Cultural Rights* which declares, *inter alia* that "[a]ll peoples have the right to self-determination. By virtue of that right they freely determine their political status," while state parties to the instruments "shall promote the realisation of the right to self-determination and shall respect the right in conformity with the provisions of the Charter..."

entity.<sup>372</sup>

The discursive connection between ethical universalism and legitimate statehood was solidified by appeals to emergent human rights norms de-legitimising the institution of colonialism. As *Reus-Smit* argues, this discursive texture provided the moral foundation for the norm of self-determination that licensed the proliferation of new sovereigns.<sup>373</sup> By building on the achievements of the two Covenants, Principle VIII of the 1975 *CSCE Helsinki Declaration* attested to what has been termed a 'new oscillationism'<sup>374</sup> by primarily expanding the right's *internal* dimension (sometimes understood as autonomy, or self-government) and widening its normative scope to the whole 'people' of every single signatory state.<sup>375</sup> While a close analysis of the instruments developed in the 1960s and 1970s showed that no right of self-determination accrued under international law to peoples of sovereign states or minority groups living in sovereign states,<sup>376</sup> the ambiguity in the deployment of international entitlements is particularly obvious in the case of the saving clause of the 1970 *Declaration on Principles Concerning Friendly Relations*. It states that nothing in the section on self-determination shall be construed as authorising or encouraging the dismembering or impairing of the territorial integrity of states conducting themselves in compliance with the principle of self-determination and thus possessed by a "government representing the whole people belonging to the territory without distinction as to race, creed, or colour."<sup>377</sup>

In effect, the formulation had initially meant that a state possessing a representative government that grants equal access to political institutions and decision making processes to the entire population within its territory is presumed to satisfy the principle of equal rights and self-determination as regards those peoples.<sup>378</sup> Reversing this proposition implied that states that do not so conduct themselves are not protected by the principle of territorial integrity.<sup>379</sup> The questions whether (i) that would justify recourse to self-determination on the part of the peoples who are not, or who claim not to be, represented in and by their government, and (ii) when, under the terms of the Declaration, this right would encompass the right to impair the territorial integrity and political unity of the state, would continue to puzzle international lawyers to an extent that it has been said that "the defining issue in international law for the 21<sup>st</sup> century is finding compromises between the principles of self-

<sup>372</sup> Cassese, *Self-Determination*, *supra* note 222, at 54.

<sup>373</sup> 'Social Construction', *supra* note 355, at 520.

<sup>374</sup> Berman, 'Oscillationism', *supra* note 186, see especially 486.

<sup>375</sup> In general see Thomas Buergenthal (ed.), *Human Rights, International Law and the Helsinki Accord* (ASIL, 1977), 203 *et seq.*

<sup>376</sup> See Daillier/Pellet, *Droit International Public*, *supra* note 34, at §342; James Crawford, 'State Practice and International Law in Relation to Secession', 69 *BYIL* (1998), 85-117; Donald L. Horowitz, 'A Right to Secede?', in *Secession and Self-Determination* 50 (ed. by S. Macedo and A. Buchanan, New York: NYU Press, 2003), at 59 *et seq.*

<sup>377</sup> A/RES/2625 (XXV), *supra* note 248.

<sup>378</sup> Cf. the US proposal to be included in the 1970 Declaration, found in UN Doc. A/AC.125/L.75 (15 September 1969). See also Robert Rosenstock, 'The Declaration on Friendly Relations', 65 *AJIL* 713 (1971), 730 *et seq.*

<sup>379</sup> Malcolm N. Shaw, 'Peoples, Territorialism and Boundaries', 8 *EJIL* 475 (1997), at 483.

determination and the sanctity of borders".<sup>380</sup>

Again, we can observe the degree to which agnostic international law veers between the adoption of self-determination and its political concept of nationality as allies in the emancipatory struggle for freedom, and their rejection that posits its irrationality against the rationality of sovereignty or human rights. In his study of self-determination, *Koskenniemi* argues that the concept both buttresses the state by acknowledging that peoples have the right to freely determine their political status without external interference, while on the other hand, it challenges the formal structures of statehood. Describing these two facets of self-determination as 'Hobbesean' and 'Rousseauesque', he concludes that

statehood per se embodies no particular virtue and...even as it is useful as a presumption about the authority of a particular territorial rule, that presumption may be overruled or its consequences modified in favour of a group or unit finding itself excluded from those positions of authority in which the substance of the rule is determined.<sup>381</sup>

As different groups began to utilise the evolving semantics of self-determination, the organised international community struggled to develop prescriptions to deal with these growing demands while expanding the range of groups to which the principle of self-determination applied.<sup>382</sup> With equal consistency, other groups opposed the extension of the principle's applicability, seeking to limit it to situations least threatening to the status quo and relying on Article 2(7) of the UN Charter which reserves to the states matters essentially within their domestic jurisdiction. As Cassese demonstrated with great insight, the political will of UN Member States, which had coalesced in the form of GA resolutions, triggered a development in which *opinio juris* and a gradual adoption, by these states, of attitudes consistent with the legal standards pronounced in these resolutions as well as in treaty law (*usus*) converged to produce a customary rule on the matter.<sup>383</sup> The emerging legal position was probably best summarised in 1971 by the ICJ, again in its Advisory Opinion on *Namibia*, where the Court held that "[t]he subsequent development in international law in regard to non-self-governing territories, as enshrined in the Charter..., made the principle of self-determination applicable to all of them".<sup>384</sup> This position was rendered slightly more judicially

<sup>380</sup> Lorie M. Graham, 'Self-Determination for Indigenous People After Kosovo: Translating Self-Determination "Into Practice" and "Into Peace"', 6 *ILSA Journal of ICL* 455 (2000), at 465.

<sup>381</sup> Martti Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice', 43 *ICLQ* 241-269 (1994), 243-44.

<sup>382</sup> For an impressive exploration of the implicit and explicit restraints on secession see, *inter alia*, Viva O. Bartkus, *The Dynamic of Secession* (64 *Cambridge Studies in International Relations*, CUP, 1999). For a somewhat provocative argument in favour of a right to secessions see Anonymous Note, 'The Logic of Secession', 89:4 *Yale LJ* 802-824 (1980).

<sup>383</sup> Cassese, *Self-Determination*, *supra* note 222, 69-70, 120 and 126 *et seq.*, with relevant literature. The ICJ held in the *East Timor* case that self-determination was "one of the essential principles of contemporary international law" (ICJ Reports 1995, *supra* note 57, at 102). See also Christian Tomuschat, 'Staatsvolk ohne Staat', in *Staat und Völkerrechtsordnung. Festschrift für Karl Doehring* (ed. by K. Hailbronner, G. Ress, and T. Stein, 1989), at 996-997. Though suggesting that the right "is not yet one which can be characterised as based on customary international law", Higgins found it academic "to argue that as Assembly resolutions are not binding nothing has changed, and that 'self-determination' remains a mere 'principle' and Article 2(7) is an effective defense against its implementation. To insist upon this interpretation is to fail to give any weight either to the doctrine of *bona fides* or to the practice of states as revealed by unanimous and consistent behaviour" (*Development*, *supra* note 312, at 101-102).

<sup>384</sup> ICJ Reports 1971, *supra* note 56, at 31.

palpable by the ICJ's opinion in *Western Sahara* that the quintessence of self-determination would include the "need to pay regard to the freely expressed will of peoples" each time the fate of people was at issue.<sup>385</sup>

(i) NORMS OF SELF-DETERMINATION AS A LATENT INTERNATIONAL ENTITLEMENT

Without intending to enter into the debate of whether the right to self-determination has developed into a peremptory norm of international law,<sup>386</sup> it is at this stage difficult to question its status as a collective 'right' in international law.<sup>387</sup> The view according to which peoples are holders of proper legal rights is not only based on a close reading of Article 1 of the ICCPR. It is also informed by ambitions that have guided member states when they sought to upgrade the position of 'peoples' to the status of participants in at least some international dealings, within the context of an international treaty. As Cassese explains, it would be contradictory to refer to a 'right' of peoples and then "actually to mean that what is granted is not a legal entitlement proper but simply an indirect benefit accruing to peoples because of the interplay of rights and obligations between Contracting States".<sup>388</sup>

A number of developments clearly stand out that are pivotal in analysing a non-state territory's emergent subjectivity. An abstract basis had been laid with the 1970 Declaration of the GA concerning Friendly Relations. In it, the GA seemed to follow this initial inductive approach. From the existence of certain rights and obligations, the GA inferred that these territories possessed a status distinct from the territory of the administering State. This distinct status "shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right to self-determination".<sup>389</sup> In the latest stage of the conceptual evolution of subjectivity – according to Article 1 of the 1966 Covenants, as well as Principle VIII of the 1976 Helsinki Decalogue – 'people' became holders of international rights with corresponding obligations upon the contracting states vis-à-vis both 'peoples' and the international community which presumably share a common interest in attainment of the entitlement to self-determination.

For the purposes of our inquiry, we can, in any case, detect the emergence of an abstract

<sup>385</sup> ICJ Reports 1975, at 33.

<sup>386</sup> Cf. the notable definition provided in Art. 53 of Vienna Convention on the Law of Treaties (1155 UNTS 331, reproduced in 8 *ILM*, 698 (1967)). In favour of the right to self-determination as a *jus cogens*: Hector Gros Espiell, 'Self-Determination and *Jus Cogens*', in *UN Law/Fundamental Rights: Two Topics in International Law* (ed. by A. Cassese, Alphen aan den Rijn, 1979), at 167-173; Cassese, *Self-Determination*, *supra* note 222, at 140; Brownlie, *Principles*, 3<sup>rd</sup> ed., *supra* note 45, at 515; Jochen A. Frowein, 'Self-Determination as a Limit to Obligations under International Law', in *Modern Law of Self-Determination*, *supra* note 354, at 218-221. *Contra* its status as peremptory norm: Crawford, *Creation of States*, *supra* note 35, at 80-82 and Pomerance, *Self-Determination*, *supra* note 167, at 70-72.

<sup>387</sup> Cf. Higgins, *Development*, *supra* note 312, 90-106. In the following paragraphs we ought to keep in mind, however, that these 'rights' or 'entitlements', be they derived from treaty sources or customary law, are located in a normative environment which does not assist its holders in effectively enforcing them. As for treaty law, the UN Covenant on Civil and Political Rights and its Optional Protocol do not provide a machinery for remedial measures where these rights are breached as these instruments do not confer on 'peoples', or their representatives, the right to submit 'communications' on alleged violations. Neither do customary rules provide a 'right' to take remedial action in cases of gross breach of the right to self-determination. See Cassese, *Self-Determination*, *supra* note 222, at 142-145 for treaty law; at 150-155 and 197-8 for customary law.

<sup>388</sup> Cassese, *Self-Determination*, *supra* note 222, at 143-144.

<sup>389</sup> A/RES/2625 (XXV), *supra* note 248.

set of entitlements that would not only apply to colonial 'peoples' or 'peoples' under foreign military occupation. They could also be applied to internationalised territories – administered in a fiduciary fashion – whose interests and entitlements, limited as they might be, are represented by an international territorial administration. A legal process that begun with the Mandate system and was carried over to the UN Trusteeship system has worked towards temporarily dislodging sovereignty at the periphery of the international system while grounding itself in a new basis, that of 'sacred trust'. Along the axis of this development, international law became more and more confronted by arguments that heightened the latent tensions between its three cardinal principles: sovereign equality of the metropolitan core, national self-determination at the periphery, and the West's 'civilising mission' through which values and beliefs would be transmitted from the metropolitan core to the periphery.<sup>390</sup> As a first result, we suggest that this evolution was compounded by the gradual constitution of a peoples' subjectivity through the emergence of a legal right to self-determination.

### 3.1.2 OTHER SOURCES OF ENTITLEMENT: THE INDUCTIVE APPROACH TO PERSONALITY

Norms of self-determination vested non-self-governing territories with an increasingly rich normative texture. Our focus on an entity's entitlement is the starting point for an inductive approach that suggests that an entity is a legal subject to the extent that rules of the international legal system refer to it.<sup>391</sup> This section argues that we may construct legal personality firstly on the basis of certain rights (and duties) that were expressly conferred upon such an entity. Rather than attaching certain rights to the concept of legal personality, we suggest that the argument should proceed from entitlement to capacity.<sup>392</sup> The reverse argument, namely that rights and duties can only be conferred upon an entity capable of bearing rights and duties, insinuates that legal capacity constitutes a prerequisite for the attribution of such subjectivity. This (mistaken) view, based on a fallacious transposition of von Gierke's essentially municipal concept of *Persönlichkeit kraft Daseins* (emergence of natural personality through mere existence)<sup>393</sup> to the international plane reifies the social and legal existence of the state. It confuses the ontological existence – the social reality within which an 'entity' can be located – with the consequences that a legal order attaches (or chooses not to attach) to it. Personality as normative concept does not flow from factual

<sup>390</sup> For a brilliant discussion of the interbellum's modernist alliance between international legitimacy and nationalist malleability, see Berman, 'Beyond Colonialism', *supra* note 352, 421-479.

<sup>391</sup> Cf. Carty, *Decay*, *supra* note 43, at 57.

<sup>392</sup> The inductive approach pursued here fundamentally differs from the 'objective' and arguably circular reasoning employed by the ICJ in the *Reparation* opinion in which it located international personality in the existence of 'objective' characteristics fulfilled by the UN. There, the ICJ took recourse to the concept of international legal personality in order to *derive from it* the right of presenting an international claim. Taking into account certain objective characteristics (such as the existence of organs), the Court concluded that international personality "can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate on the international plane...what it does mean is that it is a subject of international law and capable of possessing international rights and duties" (ICJ Reports 1949, *supra* note 120, at 179). For three thorough reviews of inductive, formal, and material approaches to international personality, cf. Manuel Rama-Montaldo, 'International Legal Personality and Implied Powers of International Organizations', 44 *BYIL* 111-155 (1970), at 112 *et seq.*; A.S. Muller, *International Organizations and their Host State* (The Hague: Kluwer Law, 1995), at 69 *et seq.* as well as Christian N. Okeke, *The Expansion of New Subjects of Contemporary International Law through their Treaty-Making Capacity* (Rotterdam: Rotterdam University Press, 1973), at 183-185.

<sup>393</sup> Otto von Gierke, *Deutsches Privatrecht I, Allgemeiner Teil und Personenrecht* (Munich/Leipzig: Duncker&Humblot, 1895), at 488.

existence.<sup>394</sup> It is the law which is the foundation of legal personality for it determines the scope and nature of personality.<sup>395</sup> Within the positivist paradigm, a person of law is therefore identical with the scope of obligations and subjective rights that it bears:

Die Person als "Träger" von Rechtspflichten und subjektiven Rechten ist nicht etwas von den Rechtspflichten und subjektiven Rechten Verschiedenes... Die physische oder juristische Person, die Rechtspflichten und subjektive Rechte – als deren Träger – „hat“, ist diese Rechtspflichten und subjektiven Rechte, ist ein Komplex von Rechtspflichten und subjektiven Rechten, deren Einheit im Begriff der Person figürlich zum Ausdruck kommt. Die Person ist nur die Personifikation dieser Einheit.<sup>396</sup>

On the international plane, the legal order chooses to formally attribute rights and obligations to – by definition, derivative – subjects of international law.<sup>397</sup> Becoming a subject of international law is the direct attribution of rights and obligations to an entity, and hence its implicit recognition as a subject of that order. The positivist definition adopted here indeed assumes that some specific rule is required 'permitting' an entity to be a 'subject' of international law, and it does so as a matter of discretion.<sup>398</sup> In an international legal order which recognises a right to, for instance, self-determination of a specific peoples, the latter can be seen as subjects of international law to precisely that degree. To the extent to which minorities possess rights deriving directly from international law, they are certainly 'subjects' of that legal order.<sup>399</sup> Whether they are capable of *exercising* international rights and duties

<sup>394</sup> This problematic argument is also employed by Okeke, suggesting that "the substantial element of personality itself...is not vested in them by international law but by the facts of international life itself. In this sense, personality itself is not totally a legal concept as such but also a sociological notion from which legal consequences ensue" (*New Subjects*, *supra* note 392, at 18-19).

<sup>395</sup> Shaw, *International Law*, 4<sup>th</sup> ed. 1997, *supra* note 67, at 137. In his General Course, Pierre-Marie Dupuy refers to norms of *lex specialis* that confer legal 'capabilities' upon subjects of international law other than states. See his *L'unité de l'ordre juridique international. Cours général de droit international public* (2000) (The Hague: M. Nijhoff, 2003), at 114.

<sup>396</sup> Kelsen, *Reine Rechtslehre*, *supra* note 26, at 177. For an appreciation of 'legal facts' – facts to which the law attaches certain consequences (duties and rights) – cf. also his 'The Principle of Sovereign Equality of States as a Basis for International Organization', 53 *Yale LJ* 207-220 (1943-1944), at 218.

<sup>397</sup> Cf. Georg Jellinek, *System der subjektiven öffentlichen Rechte* (reprint of 2<sup>nd</sup> ed., Aalen: Scientia Verlag, 1964), at 28: „Persönlichkeit...gehört nicht der Welt der Dinge an, ist überhaupt kein Sein, sondern ist eine Relation von einem Subjekt zum anderen und zur Rechtsordnung. Sie ist stets vom Rechte verliehen, nicht von Natur aus gegeben." The protracted and somewhat tedious dispute as to whether 'objective facts', or recognition itself, constitute the relevant criteria of the 'original' legal personality of states shall not be entered into here.

<sup>398</sup> This account follows Kelsen's formulation of the concept of 'personality' as a *Zurechnungssubjekt*. As presented in his *Hauptprobleme der Staatsrechtslehre* (1911), personification takes place through attribution. The concept for Kelsen is therefore purely normative and not contingent upon any other elements from the realm of *Sein*: "Allein man verschließe sich nicht der Erkenntnis, daß auch der Mensch erst durch die Zurechnung zur Person wird, und daß auch hier nur durch die Zurechnung eine Summe von natürlichen, physikalischen, chemischen und psychischen Prozessen personifiziert, d.h. zu einer normativen Einheit erhoben wird" (at 83). For a rejection of the positivist subject-object dichotomy cf. Rosalyn Higgins, *Problems and Processes. International Law and How We Use It* (Oxford: OUP, 1994), at 49.

<sup>399</sup> M.C. van Walt van Praag, 'The Position of UNPO in the International Legal Order', in *Peoples and Minorities in International Law* (ed. by C. Brölmann, R. Lefeber, and M. Zieck, M. Nijhoff, 1993), at 317. By 'directly addressed' we wish to indicate a situation in which a 'minority' is addressed by norms of international law without the necessary intermediate transformation into municipal law by the state. The system for the protection of minorities set up after WWI, as part of the Peace Treaties of Versailles, would not fulfil these criteria. The protection system was supervised by the League, yet the provisions containing the most far-reaching measures for minorities were constructed as obligations of the state. Similarly, Article 27 of the ICCPR does not directly address

is an entirely different question which will be tackled below.

(I) THE FREE CITY OF DANZIG, THE WESTBANK/GAZA, AND KOSOVO

In this formalist understanding of subjectivity, the quality of being a subject of international law can be attributed to any composite entity, *in vacuo*, hence relating it to other subjects, as well as to the very legal order that identified its subjectivity and defined its characteristics.<sup>400</sup> In the first stage of constructing legal personality we thus follow *Anzilotti* and the 'constitutive' role of international law.<sup>401</sup> Liberation movements representing peoples oppressed by a colonial power, or a foreign occupier, or a racist regime have been elevated to the status of subjects of international law because they have been addressed as such.<sup>402</sup> This conferral can also occur through the internal constitutional order of a sovereign state without relying on the context of self-determination.<sup>403</sup> A limited parcel of subjectivity can be devolved to sub-state entities for the fulfilment of a specific purpose in a way similar to which the constituent units of a federal state can be vested with a measure of international legal personality.<sup>404</sup>

Consider three instances that illuminate our understanding of subjectivity in international law. In the first case, subjectivity was constituted by international treaty law. In the second, subjectivity flows from the 'principle' of self-determination, as recognised by treaty law. In the third instance, a territory was vested with an 'entitlement' through a UN Security Council Resolution.

The creation of the Free City of Danzig by international treaty law was, to the extent that it was vested with a particular measure of autonomy, a subject of international law placed under the protection of the League of Nations.<sup>405</sup> Its capacity to possess competencies was derived from the same normative source from which its subjectivity flowed. In what we believe to support our overall argument, the PCIJ even recognised the City's international

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minorities. The obligations incurred by the contracting parties are obligations of states; they are the addressees of the international treaty and its provisions leave a margin of discretion to the state concerning the implementation of the respective obligation. For a flawed argumentative basis in the tradition of von Gierke that tries to construct legal personality from *Dasein* – in this case, deriving personality from the occurrence of ethnic criteria shared by a certain community – see Anna Meijknecht, *Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law* (Antwerpen: Intersentia, 2001), 25 *et seq.*

<sup>400</sup> Contra Verzijl, *International Law*, vol. II, *supra* note 37, at 4.

<sup>401</sup> Dionisio Anzilotti, *Lehrbuch des Völkerrechts* (vol. I., 1929), at 119.

<sup>402</sup> Cf. Shaw, 'Movements', *supra* note 326, particularly his discussion of the modes through which national liberation movements were recognised as "authentic representatives of the true aspirations of the peoples", at 22 *et seq.* See also Cassese, *Self-Determination*, *supra* note 222, at 166-167, with literature.

<sup>403</sup> See, for instance, Yongping Ge, *Völkerrechtssubjektivität und Vertragabschlußkompetenz von Hongkong*, 41 *Archiv des Völkerrechts* 220-243 (2003) as well as Roda Mushkat, 'Hong Kong as an International Legal Person', 6 *Emory ILR* 105 (1992).

<sup>404</sup> Cf., i.e., the position of Greenland under the Greenland Home Rule Act, which defines it as a "distinct community within the Kingdom of Denmark" (quoted by Nii Lante Wallace-Bruce, *Claims to Statehood in International Law* (1994), at 191). Under the Act, treaties that affect Greenland's interests are required to be referred to home rule authorities before they are concluded by Denmark.

<sup>405</sup> Articles 100-108 of the Treaty of Versailles. For a discussion cf. Verzijl, *International Law*, vol. II, *supra* note 37, at 510-545, and Malcolm M. Lewis, 'The Free City of Danzig', 5 *BYIL* 89-102 (1924), at 101 (concluding that 'it seems impossible to deny her some international status in view of her relations to the League').



personality which it linked to the City's legal capacity to act on the international plane.<sup>406</sup>

In a second case, the subjectivity of the West Bank and the Gaza strip derives from international treaty law.<sup>407</sup> The concretisation of an initial entitlement to self-determination<sup>408</sup> represented the first step in a succession of related arrangements that vested an entity with an entitlement that was to be telescoped into a partial personality of international law.<sup>409</sup> While the next argumentative step in the construction of partial legal personality – representation – will only be discussed further below, it is at this stage appropriate to point out that the 1997 Israeli-Palestinian Interim Agreement, in listing the powers and responsibilities of the Palestinian Council, specified the capacity to conclude contracts while allowing the PLO to conduct negotiations and sign agreements with states and international organisations "for the benefit of the Council" in a number of defined spheres.<sup>410</sup> The retention of residual powers by Israel, comprising all competencies not transferred to the Council,<sup>411</sup> limits the legal personality of the Palestinian entity in accordance with the general argumentative structure presented later in this chapter.<sup>412</sup>

<sup>406</sup> In the Advisory Opinion on the *Treatment of Polish Nationals and other Persons of Polish Origin or Speech in the Danzig Territory* ((Ser. A/B), No. 44 (1932)), the PCIJ approached the constitution of the Free City in search of an entity *qua* holder of sovereignty. It held that in respect to Poland, the Danzig Constitution "is and remains the constitution of a foreign State", thus being a matter "of domestic concern" to Danzig. Referring to the "ordinary rules governing relations between States", "[t]he general principles of international law apply to Danzig subject, however, to the treaty provisions binding upon the Free City" (at 23-25 and 31). Cf. also the earlier case concerning the *Free City of Danzig and the International Labour Organisation* (PCIJ (Ser. B), No. 18 (1930), at 15) and especially the reasoning of President Anzilotti in his individual opinion (at 21-22). For an account of the discussion as to the Free City was a 'State', cf. Ole Spierrmann, *International Legal Argument in the Permanent Court of International Justice. The Rise of the International Judiciary* (Cambridge: Cambridge University Press, 2005), at 332-339.

<sup>407</sup> The legal classification of the Declaration of Principles on Interim Self-Government Arrangements (DOP, or 'Oslo I'), Washington, 13 September 1993, 32 *ILM* 1527 (1993) was contested. See Kathryn M. McKinney, 'The Legal Effects of the Israeli-PLD Declaration of Principles: Steps Toward Statehood for Palestine', 18 *Seattle University LR* 93-128 (1994), at 101-105 (arguing that Israel was bound by the provisions of the DOP through an unilateral statement, even though they did not rise to the level of a treaty under the Vienna Convention on the Law of Treaties). As to the DOP's quality as a public international law treaty see Karin Calvo-Goller, 'Legal Analysis of the Security Arrangements between Israel and the PLO', 28 *Israel LR* 236-267 (1994), at 239-241. For an analysis of foreign representation competences according to the DOP, the 'Cairo Agreement' and the 'Preparatory Transfer Agreement' (both 1994) see Joel Singer, 'Aspects of Foreign Relations Under the Israeli-Palestinian Agreements on Interim Self-Government Arrangements for the West Bank and Gaza', 28 *Israel LR* 268-296 (1994).

<sup>408</sup> Recognised by Israel in the Egypt – Israel, Camp David Agreements (1978): A Framework for Peace in the Middle East, 17 *ILM* 1466 (1978) and in the Framework for the Conclusion of a Peace Treaty between Egypt and Israel, *ibid.*, 1470.

<sup>409</sup> Culminating in the Israeli – Palestinian Interim Agreement on the West Bank and the Gaza Strip (IA, or 'Oslo II'), concluded on 28 September 1995, reproduced in 36 *ILM* 551 (1997).

<sup>410</sup> *Id.*, Ch. 1, Article 9(2) as well as Article 9(5)(b), at 561.

<sup>411</sup> *Id.*, Ch. 1, Article 1(1), at 558, and Ch. 3, Article 17(4), at 564. For a general discussion of the Palestinian Authority's functional and personal jurisdiction under the IA see Omar M. Dajani, 'Stalled between Seasons: The International Legal Status of Palestine during the Interim Period', 26 *Denver JIL* 27 (1997-1998), at 65 *et seq.*

<sup>412</sup> Of special significance is the realisation that agreements with the Palestinian Authority, particularly in the field of donor assistance, were arguably void since the capacity to conclude international agreements on behalf of the Palestinian territories was not vested in the Authority, but has been retained by the Israeli military government. See Stephan Sina, *Der völkerrechtliche Status des Westjordanlandes und des Gaza-Streifens nach den Osloer Verträgen* (Berlin/London: Springer Verlag, 2004), at 344.

Kosovo is the third instance presented here to illustrate the abstract entitlement of a non-state territorial entity in international law. In order to substantiate the argument about the various means through which a unit's subjectivity can be constituted and to situate such entities in a normative context, the provisions of Security Council Resolution 1244(1999) shall be briefly examined here. The machinery devised provides for a progressive conferral of broad governmental responsibilities "under which the population can enjoy substantial autonomy within the Federal Republic of Yugoslavia" and in which the establishment of self-governing institution should ensure the conditions for a peaceful life.<sup>413</sup> Through the instrument of a SC Resolution, the international community has provided an international régime for a territory, very much in conformity with an understanding adopted from *McNair*.<sup>414</sup> The concept of 'autonomy' has arguably no fixed juridical meaning in international law,<sup>415</sup> with 'substantive autonomy' merely connoting a first stage of democratic development. However, the notion of 'self-government' has taken on a *legal meaning* which denotes a collective entitlement to a higher level of self-responsibility in the exercise of public affairs, inside a larger political system. Self-government in international law has a specific meaning shaped by the UN Charter's Articles 73(b) on colonial territories and Article 76(c) on trust territories where it is identified as one of the aims to be promoted by the relevant administering power. As *Tomuschat* points out,

self-government describes a *legal status* under which a human community enjoys full powers to govern its internal matters while still being debarred from concluding its own foreign affairs and having to accept a foreign military presence.<sup>416</sup>

Resolution 1244 is, in our understanding, the source of an abstract entitlement that constitutes a form of 'subjectivity'. In opposition to *Berman*, we indeed venture to suggest that those non-state territorial entities discussed above actually did only exist in brute positivity,<sup>417</sup> like dormant organisms, until they were 'discovered' by the law that chose to attribute certain legal consequences to their factual existence. The organised international community related them to other subjects and the legal order itself by means of an

<sup>413</sup> S/RES/1244 (1999), §10. The resolution will be discussed in more detail in Chapter V, *infra* p.147. For the capacity of the Security Council to confer rights within the institutional framework of the UN, cf. Marc Perrin de Brichambaut, 'The Role of the United Nations Security Council in the International Legal System', in *The Role of Law in International Politics. Essays in International Relations and International Law* 269-276 (ed. by M. Byers, Oxford: OUP, 2000), at 271.

<sup>414</sup> Cf. Chapter II.2.1 (i), *supra* p.65.

<sup>415</sup> Hurst Hannum and Richard B. Lillich, 'The Concept of Autonomy in International Law', 74 *AJIL* 858-889 (1980), at 885. See also Frederic L. Kirgis, 'The Degrees of Self-Determination in the United Nations Era', 88 *AJIL* 304-310 (1994), at 308; Ruth Lapidoth, 'Autonomy and Sovereignty – Are They Mutually Exclusive?', in *New Political Entities in Public and Private International Law. With Special Reference to the Palestinian Entity* (ed. by Amos Shapira and Mala Tabory, Kluwer Law International, 1999), at 4; Geoff Gilbert, 'Autonomy and Minority Groups: A Right in International Law?', 35 *Cornell ILJ* 307-353 (2002), at 307.

<sup>416</sup> Tomuschat, 'Damaged Sovereignty', *supra* note 141, at 328 (my emphasis). His arguments gain even more plausibility when we compare the ways in which international institutions have referred to the inhabitants of Kosovo, starting with 'Kosovar Albanian community' (e.g., in S/RES/1199 (LII), 23 September 1998 and S/RES/1203 (LII), 24 October 1998), to their qualification as 'people' in S/RES/1244 (§10 and Annex II §5). Cf. Natalino Ronzitti, 'Options for Kosovo's Final Status', 35:2 *International Spectator* 103-112 (2000), at 105. Those references acquired an additional spatial dimension with the designation of Kosovo as "undivided territorial unit.. which, with its people, has unique historical, legal, cultural and linguistic attributes" (UNMIK/REG/2001/9, §§1(2) and 1(1), *infra* note 618).

<sup>417</sup> Cf. 'Abeyance', *supra* note 218, at 103.

international legal instrument. The inter-war legal history of Danzig, for instance, is indicative of a relevant legal process through which internationalised territories were 'carved out' by the international legal community and 'given life' in the law of nations as a possible "solution to the problem of conflicting territorial claims and aspirations."<sup>418</sup> As a corollary, and following *Lauterpacht's* attempt to reconcile the declaratory and constitutive approaches to the formation of international persons, one would have to conclude that entities not addressed by such an international 'rule of recognition'

may exist as a physical fact. But it is a physical fact which is of no relevance for the commencement of the particular international rights and duties until by recognition...it has been lifted into the sphere of law, until by recognition it has become a juridical fact.<sup>419</sup>

For our purposes it suffices to conclude at this point that a territorial unit had indeed been 'addressed' and abstractly entitled by Resolution 1244(1999), an instrument of international law which, according to the framework followed here, represented the first phase in a trajectory that could telescope into the constitution of a legal personality *ad interim*.

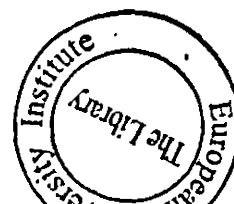
### 3.2 AGENCY AND THE CONSTRUCTION OF INTERNATIONAL PERSONALITY

Referring earlier to its 'agnostic' character when attempting to arbitrate between the two competing concepts of territorial sovereignty and self-determination essentially grounded in a notion of popular sovereignty, this chapter has so far explained, in cursory fashion, why general public international law hesitates to provide a comprehensive regulative framework for transitory territorial entities. International law has accordingly been reluctant to widen the range of participants whose conduct it purports to regulate. We noted, on the other hand, that the crystallisation of the principle of self-determination gave rise to a new class of subjects, following the conferral of rights and obligations on 'peoples'. The traditional approach to subjectivity regularly links the foundation for international legal personality with explicit recognition by states – a static perspective which tends to reduce legal personality to a descriptive notion. This approach does not, in our submission, faithfully reflect the doctrinal evolution of international law on the matter. The construction of the legal personality of internationally administrated non-state territorial entities is, we suggest, predicated on a complex interaction between an initial entitlement of a territorial unit by international law and its representation on the international plane by the same organised international community that had initially vested the entity with those abstract rights.

In order to offer a new constructive way of conceptualising international legal personality, we suggested a two-pronged approach. Firstly (as argued above), subjectivity arises out of being a direct addressee of primary or secondary international norms that grant entitlements (or incur obligations) without the interference of intermediate municipal processes incorporating the norm. This is what civil law systems understand by the term *Rechtsfähig-*

<sup>418</sup> John K. Bleimaier, 'The Legal Status of the Free City of Danzig 1929-1939: Lessons to be Derived from the Experiences of a Non-State Entity in the International Community', 2 *Hague YIL* 69-93 (1989), at 70.

<sup>419</sup> Hersch Lauterpacht, *Recognition in International Law* (Cambridge: CUP, 1947), at 75.



keit. Subjectivity, under a functional lens, will "embrasse toutes les relations possibles entre une individualité quelle qu'elle soit et un ordre juridique".<sup>420</sup> In order to draw the next conclusion, it is suggested to refer back to the distinction between subjects and persons in international law. To Pintor, a 'subject' is "le destinataire de normes juridiques" while a 'person' represents "la possibilité juridique générale d'être titulaire de n'importe quel droit et de n'importe quelle obligation appartenant à un domaine juridique donné".<sup>421</sup> As in municipal law, it is necessary to differentiate between the capacity to bring about legal effects through the actions of a body – in other words, to undertake legal transactions – and the capacity to be the bearer of legal rights and duties, previously abstractly formulated as 'entitlements'.<sup>422</sup> As distinct from subjects, international persons are then not merely addressees of norms of international law. They moreover possess the capacity to enter into relationship and operate on the international legal plane.

As the PCIJ already stated in its judgment in the *Peter Pázmány University* case, it is scarcely necessary to point out that the "capacity to possess civil rights does not necessarily imply the capacity to exercise those rights oneself".<sup>423</sup> One must naturally agree with the PCIJ as well as *Verzijl* that the true test of personality in a given legal order "would not seem to be whether an individual or composite entity derives its rights from that order, but whether he or it is in a position to pursue or/and enforce them within it".<sup>424</sup> The second step in the construction of a (limited) legal personality of non-state territorial entities therefore consists in an enquiry into their actual *Handlungsfähigkeit*, denoting the capacity to activate latent rights and obligations on the international plane.<sup>425</sup> How can a theory of legitimate representation contribute, then, to the formulation of legal personality? Could we, from an agency perspective, suggest that the normative concept of legal personality is inherent in a broader range of bodies and agencies that are representative of 'peoples'?<sup>426</sup> The following sections suggest that a wider formulation of partial legal personality includes internationalised territories slated for self-determination, and, on a provisional basis, territories whose future final status includes external self-determination.

#### (I) TWO POINTS OF CLARIFICATION REGARDING AGENCY *EX LEGE*

To further discuss agency in international law, it is at this stage imperative to supply three points of clarification that will allow us to consistently apply the terminology throughout the next sections. The first remark is of general nature. International representation is said to encompass situations in which (i) an entity acts on behalf of another on the international level and (ii) in which specific provisions are laid down by international law for the conduct of the former. This legal institution entails a split between the immediately acting international person and the entity to which the legal effects of these acts are imputed.<sup>427</sup> According to

<sup>420</sup> Manfredi Siotto-Pintor, 'Les sujets de droit international autres que les États', 41 *RCADI* 251 (1932-III), at 278.

<sup>421</sup> *Id.*, at 278-279.

<sup>422</sup> Cf. Hermann Mosler, 'Subjects of International Law', in 4 *EPIL* 710 (2000), at 715.

<sup>423</sup> *Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (Peter Pázmány University v. the State of Czechoslovakia)*, PCIJ (Ser. A/B), No. 61 (1933), at 231.

<sup>424</sup> *Verzijl*, *International Law*, vol. II, *supra* note 37, at 3.

<sup>425</sup> The term *Handlungsfähigkeit* (contractual capacity) has been used extensively in German public international law literature and will be employed throughout this chapter.

<sup>426</sup> Cf. Konrad Ginther, 'Liberation Movements', 3 *EPIL* (1997), at 213.

<sup>427</sup> Angelo P. Sereni, 'Agency in International Law', 34 *AJIL* 638-660 (1940), at 638.

general principles, authorisation or delegation are required by the entity which is being represented. Any act of representation by the representative must be exercised in the name of and on behalf of the entity.<sup>428</sup> It follows that the authority exercised is that of the entity to which the legal effects of the agent's actions can be imputed. This distinguishes representation in international law from all other cases in which governmental authority (of a state) is exercised by another entity.<sup>429</sup> Accordingly, no transfer of government authority takes place.<sup>430</sup> The represented entity itself becomes the party which is directly liable and who is the direct claimant vis-à-vis a third party.<sup>431</sup>

Secondly, we define agency as the relationship between the territorial agent and an entity that is under its temporary protection. This usage might differ from the regular application of the concept since agency is normally established between an agent and a 'principal'. In an asymmetric relationship, such as between a mandant and a mandatory, the usage of the term 'principal' would be entirely misleading. It would suggest that the mandant would have the capacity to appoint the agent (and revoke the agency) which is regularly not the case in an international fiduciary bond. It is in this sense that we can speak of 'compulsory agency *ex lege*', insinuating that agency is assumed on grounds of necessity, and vested in the agent by international law. The term also suggests that the agent is obliged to only perform functions in fulfilment of the purposes for which agency was established.<sup>432</sup> As should be apparent from our discussion of the Mandate and Trusteeship systems' properties in the second chapter of the thesis, the agency relationship is essentially of a *fiduciary* nature. Features of this fiduciary bond, in which no advantage accrues to the agent, are inherent in a relationship of international agency *ex lege* and will re-appear when we discuss the performance of multilateral peace-building missions that are instituted to monopolise agency and the position of occupation authorities vis-à-vis the occupied territory.<sup>433</sup>

The discussion so far offered formalistic definitions and introduced agency as essentially a *legal relationship* between the (authorised) territorial agent and an entity under its temporary administration. The third point of clarification posits that this conception is insufficient to gauge the extent to which subjectivity is actually *performed*.<sup>434</sup> Having defined agency as a complex relationship through which entitlement is discharged on the international plane, our discussion of the 'construction' of international legal personality will therefore draw on the *practice* of agency which we understand to be not only a set of relations but an *action* designed to perform this relationship by responding to choices and sets of interests.<sup>435</sup>

<sup>428</sup> Cf. Hermann Meyer-Lindberg, 'Organe des völkerrechtlichen Verkehrs', in *Wörterbuch des Völkerrechts* (vol II, ed. by H.-J. Schlochauer, Berlin: Walter de Gruyter & Co., 1961), at 669-70.

<sup>429</sup> See Verdross, et al., 'Gebietshoheit', *supra* note 61, at 244-45.

<sup>430</sup> Cf. Geiger, *Beschränkung*, *supra* note 156, at 143-44.

<sup>431</sup> *Id.*, at 67-68.

<sup>432</sup> Sereni, 'Agency', *supra* note 427, at 651.

<sup>433</sup> The essentially fiduciary nature of the occupant power will be briefly discussed in Chapter IV.2.2, *infra* note 535.

<sup>434</sup> For a critique of the formalistic view that equates representation with authorisations see Hanna F. Pitkin, *The Concept of Representation* (Berkeley/Los Angeles: University of California Press, 1967), at 38-59.

<sup>435</sup> In this broad understanding adopted from Giddens, agents are corporate entities whose acts materially affect the international system. Recognising the connection between the notion of agency and that of *Praxis*, an agent's action will thus be presented as a stream of 'actual...

### 3.2.1 REPRESENTATION-IN-TRUST

Given the diverse nature of fiduciary administrations, the rule that an international agent is appointed for the conduct of all international relations has to be qualified. The capacity to act on behalf of a territory, assumed by the agent, has been limited to different degrees in a number of anomalous situations – among them territories administered under the Mandate system, territories under international occupation, in cases of special territories designed to neutralise a conflict (Danzig), and generally in instances of political dependency.<sup>436</sup> As *Rauschning* explained with regard to agency of necessity of dependencies, the limitation to their capacity to act is grounded in the transfer of external powers to the agent:

der beschränkende Rechtssatz ist gleichzeitig der zur Stellvertretung berechtigende. Rechtsgrund der Stellvertretung ist bei Protektoraten der Protektorsvertrag mit dem protegierenden Staat, bei Staaten unter Mandat oder Treuhandschaft entweder die Mandats- oder Treuhandsatzung, an deren Zustandekommen der Vertretene gar nicht beteiligt ist, oder auch der *Akt des Treuhänders* oder des Mandatars, mit dem dieser seine Treuhandgewalt zugunsten der Autonomie des neugebildeten Selbstverwaltungsverbandes im Bereich der inneren Angelegenheiten beschränkt und sich die auswärtige Vertretung vorbehält. In Fällen der notwendigen Stellvertretung ist der Inhaber der Vertretungsmacht regelmäßig nicht an die Weisungen des Vertretenen gebunden – deren angenommenes Unvermögen zu einer Außenpolitik bildet ja gerade den Sinn einer Beschränkung der Geschäftsfähigkeit.<sup>437</sup>

In the case of political dependencies, it was, however, possible for the local political institutions of a colony under fiduciary administration to represent themselves if they had acquired capacity to act on the international plane with a view to dispensing certain functions.<sup>438</sup> With regard to the residual functions of the metropolitan agent, it can be said that the latter remained the 'representative' of the colony.<sup>439</sup> Accordingly, the international legal status of protectorates and dominions and their concomitant treaty making power has varied.<sup>440</sup> Entities which were states before they became protectorates retained, in many cases, international legal personality in accordance with the functions their patron state/agent wanted it to perform, while their contractual capacity remained limited.<sup>441</sup> In other cases, the subjection had been so complete that no more than a limited international legal personality

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interventions of corporal beings in the ongoing process of events-in-the-world" (*New Rules of Sociological Method: A Positive Critique of Interpretative Sociology* (New York: Basic Books, 1976), at 75).

<sup>436</sup> Sereni, 'Agency', *supra* note 427, at 647.

<sup>437</sup> *Das Schicksal völkerrechtlicher Verträge bei der Änderung des Status ihrer Partner* (Hamburg: Hansischer Gildenverlag, 1963), at 39 (italics supplied).

<sup>438</sup> Cf. Oppenheim, *International Law*, vol. I (9<sup>th</sup> ed., by Jennings/Watts, Harlow: Longmann, 1992), at 278-9, §§14-17.

<sup>439</sup> For representation within the British Commonwealth cf. generally Crawford, *Creation of States*, *supra* note 35, at 238-246. The treaty-making faculties of the British dominions vis-à-vis their continued commitment to imperial 'political' treaties is also discussed in Daniel P. O'Connell, 'Independence and Succession to Treaties', 38 *BYIL* 84 (1962), at 92-95. Cf. also Malcolm M. Lewis, 'The Treaty-Making Powers of the Dominions', 6 *BYIL* 31 (1925).

<sup>440</sup> For an exhaustive study of protectorates and their partial subjectivity see Alfred M. Kamanda, *A Study of the Legal Status of Protectorates in Public International Law* (Ph.D. Thesis no. 125, Institut Universitaire de Hautes Études Internationales, Geneva, 1961), at 188 *et seq.* Cf. also Geiger, *Beschränkung*, *supra* note 156, at 77 and 142; and Rudolf Kirchschläger, 'Protektorat', in *Wörterbuch des Völkerrechts*, vol. II, *supra* note 428, at 808-810.

<sup>441</sup> See Alfred Verdross and Bruno Simma, *Universelles Völkerrecht* (3<sup>rd</sup> ed., Berlin: Duncker & Humblot, 1984), at 235-6, as well as Crawford, *Creation of States*, *supra* note 35, 188-198.

and, consequently, a very limited *Handlungsfähigkeit* was retained by the protected entity.

As far as the legal status of territories under the Mandate system was concerned, a distinction was drawn between 'C'-class Mandates – which had no international personality at all (the agency of the Mandatory power being overarching) – and 'A' and 'B'-class Mandates – which had a limited personality because they were endowed with a limited contractual capacity.<sup>442</sup> The process of 'immediatisation' had begun with provisional recognition of the international personality of those entities formerly belonging to the Ottoman Empire in Article 22(3) of the Covenant.<sup>443</sup> In performing the commission, the mandatory usually acted in his own name (mandate without representation) while in some cases, an agency relationship was indeed collateral to the mandate (mandate with representation).<sup>444</sup> In the latter case, the mandatory acted in the name of his mandant and the acts performed by the former had an immediate effect for the mandant as if the latter had acted in person. The fact that the conduct of the agent herself – the mandatory – was to a certain degree 'controlled' by another international subject – the League of Nations – was, at least for *Sereni*, no reason to doubt the agency of the former.<sup>445</sup> In his Dissenting Opinion in the 1962 *South West Africa* cases, Judge *Bustamante* directly inferred limited capacity from entitlement. His approach is instructive in order to apprehend the overall concept of representation-in-trust that lay at the basis of the Mandate system:

Art. 22 of the Covenant recognised [the populations under Mandate] as having various rights, such as personal freedom (prohibition of slavery), freedom of conscience and religion, equitable treatment by the Mandatory, and access to education, economic development and political independence (self-determination). They were thus recognised as having the *capacity*

<sup>442</sup> This was the opinion of the *Institut de droit international* which, at its Cambridge session in 1931, resolved that "les collectivités sous mandat sont des sujets de droit international. Elles ont un patrimoine distinct de celui de l'Etat mandataire, et peuvent acquérir des droits ou être tenues d'obligations propres... Les droits et obligations des collectivités sous mandat ne sont pas affectés par la cessation du mandat" (Resolution on 'Les Mandats internationaux', *Annuaire de l'Institut de droit international* (1932, Vol. II), at 234. For representation of trust territories before international organisations cf. Karl Zemanek, 'State Succession After Decolonisation', 116 *RCADI* 187-300 (1965-III), at 245 et seq. Cf. also his highly relevant remarks regarding loans contracted by international agreements with the IBRD: "When a dependency was the contracting party, it thereby became, *within the scope of the provisions of the agreement, a person of international law, directly responsible for the performance of the agreement*" (at 259, italics supplied). This aspect will be taken up in Chapter V.2.1 (iii), *infra* p.174.

<sup>443</sup> Cf. the arguments advanced by Verdross preceding his conclusion that the Mandate territories "have an international legal personality in their own right" (*Völkerrecht*, 5<sup>th</sup> ed., *supra* note 45, at 211). As explained in Chapter II.1.1, Palestine/Transjordan, Syria/Lebanon, and Mesopotamia had, in the terms of Article 22(4) of the LON Covenant, reached a stage of development where their existence as independent nations could be provisionally recognised "subject to the rendering of administrative advice and assistance by a Mandatory until such time as they (were) able to stand alone". The Powers mandated to administer the three entities in the Middle East acted, in any case, *on behalf* of the mandated territory that lacked an autonomous capacity to act, in a manner that was compared to a relationship of a suzerain state with regard to his vassal (Verzijl, *International Law*, vol. II, *supra* note 37, at 546. Further on the subject of vassal states cf. Oppenheim, *International law*, vol. I, 8<sup>th</sup> ed., *supra* note 198, at 188 et seq.). For a general discussion see Stephen D. Krasner, 'Pervasive, Not Perverse: Semi-Sovereigns as the Global Norm', 30 *Cornell ILJ* 651 (1997), at 659 et seq.

<sup>444</sup> For representation especially in protectorates see Riad Daoudi, *La représentation en droit international public* (1980), at 353-363.

<sup>445</sup> *Sereni*, 'Agency', *supra* note 427, at 655. Evidence for a UN organs *general* capability to represent a territory is found in Article 72(d) of the 1958 Convention on the International Maritime Organization: In case the UN would assume the direct administration of a trust territory, "the United Nations may accept the Convention on behalf of one, several, or all of the Trust Territories...".

of legal persons, and this is why in the Mandate agreements those populations are...parties possessed of a *direct legal interest*, although their *limited capacity* requires that they should have a representative or a guardian...<sup>446</sup>

To *Bustamante*, the 'sacred trust' related not only to duties of a moral order but also to *legal obligations* correlative with the rights recognised as belonging to people under fiduciary administration. By these provisions, international law claimed for such peoples the quality of legal persons whose *Handlungsfähigkeit* was temporarily assumed by a 'guardian':

I cannot see any reason for not recognising the populations under international Mandate as having the status of legal persons and for not applying to them the principle of the necessity of their legal representation by 'third parties' since these peoples have the *rights* recognised by the Covenant together with a certain *capacity*, although a *diminished* one, as in the case of wards under municipal law.<sup>447</sup>

Note that this quote from the dissenting opinion records, in the exact order, the three argumentative stages which are followed here in the 'construction' of legal personality: entitlement, agency and functional limitation. A similar line of reasoning was employed with regard to a non-self governing territory in the ICJ's 1995 *East Timor* case. In his dissenting opinion, Judge *Weeramantry* offered a functional argument in favour of a continued agency of the administering power, Portugal (that had lost effective control over the territory). His penetrating reflections on the contested status of the administering power were based on considerations of the essential *needs* of the territory while he inferred Portugal's continued representative status from general considerations of *functional necessity*. The 'umbilical cord' linking East Timor to the international community must have survived Portugal's loss of authority, because

[a]ny other view would result in the anomalous situation of the current international system leaving a territory and a people, who admittedly have important rights opposable to all the world, defenceless and voiceless precisely when those rights are sought to be threatened or violated.<sup>448</sup>

The findings of the present analysis can thus be summarised as follows: the capacity to possess rights (which equals subjectivity, in the terminology employed here) does not necessarily imply the capacity to exercise those rights 'oneself'. As *Lauterpacht* aptly remarked with reference to the concept of procedural capacity, "the fact that the beneficiary of rights is not authorised to take independent steps in his own name to enforce them does not signify that he is not a subject of the law or that the rights in question are vested exclusively in the agency which possesses the capacity to enforce them."<sup>449</sup> Doctrine and jurisprudence have leaned towards transposing the common law concept of wardship to the international plane and have established that a protected state can enter into a relationship

<sup>446</sup> ICJ Reports 1962, *supra* note 192, at 354.

<sup>447</sup> *Ibid.*, at 354-355 (italics supplied).

<sup>448</sup> ICJ Reports 1995, *supra* note 57, at 181.

<sup>449</sup> Hersch Lauterpacht, *International Law and Human Rights* (1<sup>st</sup> ed. 1950, Archon Books, Cambridge, 1968), at 27. Similar Rauschnig, *Status*, *supra* note 437, at 42.



with other subjects through the agency of the protecting state.<sup>450</sup> The protecting agent possesses the *jus repraesentationis omnimodae*, i.e. the plenary and exclusive competence in international law to represent the entity in the international sphere.

### 3.2.2 AGENCY AND 'PERFORMATIVITY'

The institution of international agency has been interpreted by one author in a rigid manner: "No international agency can be recognised where the alleged principal, agent or third party is not an international person".<sup>451</sup> This logic is, of course, circular. It presents agency as a relationship between already existing international persons. The arguments advanced in this section, on the other hand, gravitate around the performance of the agency relationship and endeavour to distil from it a normatively relevant essence for the 'construction' of international legal personality. We will consider the following proposition: (i) if a series of acts performed by an agent are allowed to be legal acts in the sense that they access the international legal order, and (ii) if the agent is admitted to have the capacity to perform them, this performance activates the 'latent' subjectivity of the entity on whose behalf the agent acts. The performance of its subjectivity by an agent hence renders a non-state territory an international legal personality with the capacity to pursue its abstract 'interests' on the international stage. We will conclude that the performance of a latent entitlement entails the establishment of relations between the entity in question and any kind of third persons<sup>452</sup> and thus constitutes legal personality.

The propositions advanced here are largely based on *Lauterpacht's* approach to partial personality in international law. He concluded that relationships of international legal nature are possible *prior* to 'recognition' of statehood (which he saw as constitutive). For the areas in which such relationships have been instituted, he deemed partial legal personality as established: "A situation is thus created in which the unrecognised community is treated for some purposes as if it were a subject of international law".<sup>453</sup> In order to demonstrate the proximity of *Lauterpacht's* thinking on legal personality to the constitution of human subjectivity through the utilisation of language, consider the following quote by *Butler*. She stresses the importance of discursive practices through which the foundational units of reality are constituted:

Language sustains the body not by bringing it into being...in a literal way; rather, it is by being interpellated within the terms of language that a certain social existence of the body first becomes possible. To understand this, one must imagine an impossible scene, that of a body that has not been given social definition, a body that is, strictly speaking, not accessible to us,

<sup>450</sup> For the contingency of a protectorate's status as an international person on the terms of the particular treaty, see Oppenheim, *International Law*, 8<sup>th</sup> ed., *supra* note 198, at 192-193. For US jurisprudence concerning the practice of agency cf. the case *Porter v. United States* in which the Court stated: "...the Secretary [i.e. of the Interior] established in 1967 a Trust Territory government which included legislative, judicial, and executive branches, with the High Commissioner as chief executive of the Territory... The Secretary also reserved to himself or his delegate the power and authority to contract, "on behalf of the Trust Territory", for the purchase, charter, maintenance and operation of aircraft and surface vessels in the islands." (61 *ILR* 102, at 106-107, discussed in L. Erades *Interactions Between International and Municipal Law. A Comparative Case Law Study* (ed. by M. Fitzmaurice and C. Flinterman, The Hague: T.M.C. Asser Institute, 1993) at 445).

<sup>451</sup> Sereni, 'Agency', *supra* note 427, at 639.

<sup>452</sup> Cf. Mosler, 'Subjects', *supra* note 422, at 712.

<sup>453</sup> Lauterpacht, *Recognition*, *supra* note 419, at 53-54.

that nevertheless becomes accessible on the occasion of an address, a call, an interpellation that does not 'discover' this body, but constitutes it fundamentally. We may think that to be addressed one must first be recognised... [T]he address constitutes a being within the possible circuit of recognition and, outside of it, in abjection... One comes to 'exist' by virtue of [a] fundamental dependency on the address of the Other. One 'exists' not only by virtue of being recognized, but, in a prior sense, being *recognizable*.<sup>454</sup>

In other words, the self manifests itself when speaking and being spoken to, because speech acts refer to the self as the speaker. The self is implied reflexively in the operations of, e.g., speaking or acting.<sup>455</sup> In a re-formulation of post-structural thinking that conceives subjectivity through discourse – perlocutionary speech acts that produce effects achieved in an addressee by a speaker's utterance and that bring into being what they name –, legal personality can indeed be apprehended as 'constructed' and mediated by agency. An agent's acts are performative of an entity's subjectivity. Without intending to reify international legal conceptions of personality, the parallels between *Butler*, *Ricoeur* and *Lauterpacht* are indeed striking: human subjectivity embedded in social structures (*legal personality*) is reflexively constituted through the discursive texture (*legally significant acts*) that is spun (*concluded*) between the 'inside' of a body (*a non-state territorial entity*) and the 'outside' of the interpellating society (*the international legal system*). Both modes of conceiving 'personality' imply that a subject, understood as an addressee of speech acts (*international norms*) can be given effect through human (*legal*) agency which expresses the consciousness (*legal interests*) of the entity it represents. Performativity, in both cases, is "the vehicle through which ontological effects are established".<sup>456</sup> Practices of representation and its discursive mode reproduce a particular mode of subjectivity and are performative of it. As we will see at a later stage, the performance of international agreements is the most conspicuous manifestation of an entity's international legal personality. The reasoning that Cassese employed with regard to international treaty-making capacities of other non-state actors can also be considered here:

Of course it is not because they possess this personality that they can enter into these agreements. The contrary is true. It is because these agreements are regarded by the contracting parties (states and international organisations) as international treaties proper, that the inference can be drawn that the national liberation movements entering into such agreements are endowed with international legal personality (albeit of a limited kind).<sup>457</sup>

One of the conclusions we can draw from this contextual detour on our way to addressing contemporary international legal scholarship, is that personality – as a concept applied to non-state territorial entities – is nothing but shorthand for the proposition that an entity is endowed by international law with a set of entitlements and obligations (subjectivity) which it effectively discharges through international agency. The agent will henceforth temporarily re-

<sup>454</sup> Judith Butler, *Excitable Speech: A Politics of the Performative* (New York/London: Routledge, 1997), at 5 (emphasis in the original, footnote omitted).

<sup>455</sup> Cf. Paul Ricoeur, *Oneself as Another* (London: University of Chicago Press, 1992), at 14.

<sup>456</sup> Judith Butler, quoted by Peter Osborne (ed.), *A Critical Sense: Interviews with Intellectuals* (London: Routledge, 1996), at 112. For a discussion of the use of performative utterances in the creation of institutional facts see John R. Searle, *The Construction of Social Reality* (New York: Simon & Schuster, 1995), at 54-55.

<sup>457</sup> Cassese, *Self-Determination*, *supra* note 222, at 169. For a careful analysis see also J.A. Barberis, 'Nouvelles questions concernant la personnalité juridique internationale', 179 *RCADI* 145 (1983-I), at 259-64.

present the entity and, in a post-structural reading, be 'performative' of its subjectivity. Judge Weeramantry's approach in the *East Timor* case sought to construct a territorial unit's personality from considerations of the essential needs of the territory while adopting a functional necessity perspective on the modes of its external representation. This is equally relevant and can be applied to territories under temporal international administration. In cases of internationalisation by way of reliance on Chapter VII of the UN Charter, the territory's 'subjectivity' is performed by an international territorial administration that is vested with the capacity to exercise treaty-making powers with regard to other subjects of international law.

These propositions lead to a more differentiated understanding of the importance of the temporary convergence between international normative space and 'the people' who have become addressees of international entitlements. For once, the international legal order reaches the object of its concern directly, through vesting it with an agent, without mediation by a constraining sovereign structure. As a corollary, the protected entity in question can accede to the international legal order without the intermediate level of state sovereignty. On the international plane, states henceforth concede to collaborate reciprocally with the territory in question through the medium of the international agent whose performative manifestations of intention are attributed to the entity. These practices install ontological effects for they are, in our submission, considered 'performative' of the territory's subjectivity in its spatio-temporal specificity.<sup>458</sup>

At that stage, the relatively abstract concept of personality as an auxiliary concept of juristic thinking begins to present itself as a substantive theory concerned with the interrelationship between rights and duties afforded under international law and their representation. These insights illuminate our investigation into the normative properties of an internationalised territory located at the intersection of municipal and international law.<sup>459</sup> Legal personalities – like selves – are, in this understanding, 'performed' through fronts. One way of gauging the extent of legal personality is therefore to examine the phenomenology of representation – a task that we have reserved for a later stage.<sup>460</sup> For now, we conclude that as a direct consequence of this complex interaction of the relevant normative behaviour performed through a relationship of agency, the territorial entity can enter into relationships with other persons of international law.<sup>461</sup> If discretion to act is legal competence then it is true to say that the international agent administering a non-state entity has *Handlungsfähigkeit* with regard to that

<sup>458</sup> It is a separate question whether the thus mediated limited international personality of a non-state territorial entity under temporary UN administration is also opposable vis-à-vis states which have not 'conceded to collaborate' with such an entity. Without intending to enter the discourse on recognition (which has commanded the considerable attention of post-War legal scholarship), one may draw a cautious parallel to the ICJ's *Reparation* opinion in which it accepted the UN's international personality to be effective against non-members (ICJ Reports [1949], *supra* note 120, at 185). The thinking underlying the parallel between the status of internationalised territories and international organisations will be clarified *infra*, at p. 115.

<sup>459</sup> See the discussion in Chapter VI.2.2, *infra* p.218

<sup>460</sup> Chapter V.2.1 discusses the general capacity of an international territorial administration to enter into treaties on behalf of the non-state territorial entity and points at specific instances of treaties concluded by UNMIK and UNTAET with other subjects of international law (*infra*, p. 165).

<sup>461</sup> The admission of the Saar Territory to the Universal Postal Union (Berne) and to the International Telegraphic Convention (Petrograd) (LNOJ 1920, 67 *et seq.*) is correctly interpreted as an example of the limited personality of an internationalised territory. In addition, the Saar Territory's Governing Commission was competent to represent the Saar railways in all matters relating to the application or revision of the International Railway Transport Convention (LN Council Resolution, 2 October 1921; sources quoted in Hannum/Lillich, 'Concept', *supra* note 415, at 875).

entity. The initial latent subjectivity of a territory – addressed by norms of international law that circumscribe its content – is activated *qua* 'performance' by an agent projecting both its duties and rights to the international plane. The latter's general representation capacity can, however, be subject to qualifications and limitations.

#### RÉSUMÉ: FUNCTIONAL APPROACHES TO LEGAL PERSONALITY

As Crawford noted in his seminal study, it is difficult to assess the capacity of entities *in statu nascendi* to acquire rights under forms of international arrangement.<sup>462</sup> Similar to international protectorates, non-state territorial entities vested with an international agent subsist within a grey area of international law – between the two dimensions of being either a legal nullity or a fully-equipped member of the international community. Applying first a positivist and then a 'constructivist' frame to investigate the normative significance of entitlement and agency, we suggested that such territories veer towards legal existence. Accordingly, we presented international legal personality as a non-static concept. The capacity of an entity may increase or decrease to the extent to which functional areas where the international agent performs acts of representation expand or compress.<sup>463</sup> The emerging legal personality of a non-state territory is therefore *functionally limited* to the same extent that the agent's mandate is limited by international law.<sup>464</sup>

It is time to collect the strands of a lengthy argument. By way of evaluation it appears appropriate to suggest that 'international legal personality' as well as 'functionally limited capacity' are convenient terms for denoting the *extent of an entities' function* on the international level as performed by its agent, as well as for drawing a non-rigid distinction between various categories of international legal subjects. This does not amount, as Allott proposes, to abandoning the conceptual category of international legal subjects altogether,<sup>465</sup> but to rendering it more accessible and inclusive for new participants in international legal relations. When deliberating the status of entities other than states or international organisations, it seems particularly suitable to 'unbundle' the concept of legal personality to further develop it as a spectrum that recognises a range of varying statuses and severable entitlements, always contingent upon the degree to which a territorial agent has been mandated, *ex lege*, to perform them. In order to do this, we must take into consideration international law's acknowledgement of several degrees of legal personality (*abgestufte Völker-*

<sup>462</sup> *Creation of States*, *supra* note 35, at 394.

<sup>463</sup> It has been shown above that certain colonies and mandated areas at one point enjoyed limited capacity and have subsequently acquired the unlimited international legal personality which flows from statehood. See also Hermann Mosler, 'Völkerrechtsfähigkeit', in *Wörterbuch des Völkerrechts*, vol. III (ed. by H.-J. Schlochauer, Berlin: Walter de Gruyter & Co., 1962), 665-677, at 675-6.

<sup>464</sup> While we do not mean to equate the conglomerate of rights and duties which makes up the position and legal status of international organisations with those of non-state territorial entities, a careful analogy can be drawn to the PCIJ's conception of *functional limitation* when it spoke of the European Commission on the Danube as having only the "functions bestowed upon it by the Definite Statute with a view to the fulfilment of that purpose, but it has the power to exercise these functions to their full extent, in so far as the Statute does not impose restrictions upon it" (*Jurisdiction of the European Commission of the Danube between Galatz and Braila*, PCIJ (Ser. B), No. 14 (1927), at 64). Similarly, the extent of a protectorate's personality can be determined by the nature of its connection with, or functional dependence on, the protecting state. See Kamanda, *Protectorates*, *supra* note 440, at 200.

<sup>465</sup> Philip Allott, *Eunomia: New Order for a New World* (Oxford: OUP, 1990), at 372.

*rechtsfähigkeit*)<sup>466</sup> which, following the precedent of international organisations, must be defined *in relation to the respective functions* the subject in question fulfils regarding the needs shared by the international society.<sup>467</sup> The *capacité juridique* of the entity, as manifested through an international agent, is contingent and depends upon its purposes and functions. It is delineated by a principle of functional limitation.<sup>468</sup>

This argument converges with the predominant (subjective) school of thought which, in reference to the legal personality of international organisations, holds that some act of explicit or implicit conferral by states is necessary for an entity to correspondingly become a 'derivative' international legal person.<sup>469</sup> The extent of this personality will depend on the functions the entity is to perform according to the will of its creators. In analogy to the doctrine concerning international organisations, one could concur with O'Connell that it would be a mistake to jump to the conclusion that such a non-state entity has personality "and then to deduce specific capacities from an *a priori* conception of the concomitants of personality."<sup>470</sup> Following O'Connell, the correct approach equates personality with (i) latent subjectivity and (ii) the agent's capacities to activate and perform those, and proceed to (iii) inquire into the limits of the agent's capacities.

This conclusion complements our discussion in the preceding chapter expounding upon some of the novel aspects of the notion of fiduciary administration and how we could make sense of the relationship between an administering power and the people of 'non-self-governing territories'. Was the traditional understanding of an administering power as trustee replaced by some conception of it as an 'agent' of the people? Reading Chapters II and III together, the analysis of the relationship between the international organ and the constituted partial personality of an internationalised territory that it administers benefits from an understanding that combines the legal characteristics of both trust and agency. This synthesis of an international administration's obligations draws considerably upon the Supreme Court of Canada's discussion of the fiduciary relationship, in municipal law, between Indians and the federal government in which it held that "[while the Crown's fiduciary obligations to the Indians is not technically a trust], the obligation is *trust-like in character*. As would be the case with a trust, the Crown must hold surrendered land for the *use and benefit* of the

<sup>466</sup> Bardo Faßbender, 'Die Völkerrechtssubjektivität internationaler Organisationen', 37 *ÖZöRV* 17-49 (1986), at 26.

<sup>467</sup> Cf. *Advisory Opinion on Reparation for Injuries*, ICJ Reports [1949], *supra* note 120, at 174: "[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends on the need of the community". The doctrine of functional necessity was comprehensively formulated by Michel Virally, 'La notion de fonction dans la théorie de l'organisation internationale', in *Mélanges offerts à Charles Rousseau: La communauté internationale* 277-300 (ed. by S. Bastid et al., Paris: Pédone, 1974) and further developed by, *inter alia*, Peter H.F. Bakker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities* (Dordrecht: M. Nijhoff, 1994). See particularly his discussion of the concept of function (at 42-51) and its application to the notion of personality (at 54-61)).

<sup>468</sup> For international organisations cf. Rama-Montaldo, 'Personality', *supra* note 392, at 141.

<sup>469</sup> The objective approach to international personality, on the other hand, focuses on criteria independent of the subjective will of states. As long as an international organisations has at least one organ which can express its will, it is a general subject of customary international law *ipso facto*. As such it bears the inherent capacity to perform certain acts which it is in a practical position to perform. Cf. Finn Seyfersted, 'Is the International Personality of Intergovernmental Organisations Valid vis-à-vis Non-Members?', 4 *Indian JIL* 233-265 (1964).

<sup>470</sup> O'Connell, *International Law*, vol. I, *supra* note 62, at 98.

surrendering Band... The fiduciary relationship between the Crown and the Indians also bears a certain resemblance to *agency*, since the obligations can be characterised as a *duty to act on behalf* of the Indian Bands".<sup>471</sup>

Similarly, the legal responsibilities of an international administration are best captured when likening them to those of an agent which, in its internal relation with the territory, is bound by fiduciary obligations. In this understanding, we can argue that the concept of internationalisation gave a new structure to the 'sacred trust' in that the features of the trust in the *Innenverhältnis* were combined with legal features of agency in the *Außenverhältnis*. The constructive approach to international legal personality hence solidifies the argument in legal terms that the international community is obligated to act in the interest of such transitorily administered entities. This insight, although for now relatively indeterminate, represents one of the bases from which the discussion of UNMIK's role in relation to the territory of Kosovo will be launched in Chapter V.

Focusing on the status of the territory under international tutelage, another substantive thrust of this chapter consisted in advancing a set of arguments that international legal personality is deemed to be a contingent phenomenon and as such a *function of the evolving requirements of international life*. Generally speaking, the legal determination of internationalised territories is contingent upon two sets of situations. In short, these are the needs and preferences of the territorial entity in question, represented as it is by an agent, as well as the *public international legal interest* of the whole of the international community, the *Staatengemeinschaftsinteresse*.<sup>472</sup> Limitations to the legal personality of a non-state territorial entity will thus be determined firstly by reference to a specific territory's particular circumstances, namely its needs and interests, defined as a pattern of demands and its supporting expectations.<sup>473</sup> Secondly, a determination must also account for the characteristics and present needs of the international community, understood as the social preferences underlying its strategic calculations. This functionalist interpretation utilises international legal personality as an intermediary, rather than a barrier, allowing international law to reach "all the way down to the individual inside the collective".<sup>474</sup>

The next chapter seeks to further build on these conclusions regarding the role of territorial agency. There, we explore the dual functions of such an administration before applying the framework to the decolonisation process of South-West Africa. The establishment of the UN Council for Namibia – already discussed in Chapter II – represents the seminal case in

<sup>471</sup> *Guerin v. The Queen* [1984] 2 S.C.R. 335, at 386-87 (italics supplied). The Crown's breach of duty in *Guerin* was therefore a breach of both its fiduciary obligations and those arising from the relationship of agency. For a juxtaposition of *Guerin* with the ICJ's *East Timor* case cf. Karen Knopp, *Diversity and Self-Determination in International Law* (Cambridge: CUP, 2002), at 202-209.

<sup>472</sup> Schoiswohl applies a similar line of argument to the international status of *de facto* regimes in 'De facto Regimes and Human Rights Obligations – The Twilight Zone of Public International Law', 6 *Austrian RIEL* 45 (2001), at 54. The debate over whether it is heuristically useful to engage in such obvious reductionism that assigns 'interests' or 'social preferences' to groups (of states) and whether the notion of *Staatengemeinschaftsinteresse* has any discernible content will be taken up in the introduction to the following chapter.

<sup>473</sup> Cf. Harold D. Lasswell/Abraham Kaplan, *Power and Society* (New Haven: Yale UP, 1950), at 23.

<sup>474</sup> Janne E. Nijman, *The Concept of International Legal Personality. An Inquiry Into the History and Theory of International Law* (The Hague, T.M.C. Asser, 2004), at 120.

which complex normatively relevant acts pronounced by both the territorial agent and the members of the international system installed temporary 'ontological' effects. The creation of the Council was not only an attempt to divest the Union of its right to represent South-West Africa in the international diplomatic arena. It was also meant to operationalise the latent international personality (subjectivity) vested in the territory itself. The picture that emerged with the admission of the territory to associated and full membership in international organisations was that of a *sui generis* status that enabled it to stand on equal footing in these specialised agencies with sovereign states, and to enjoy certain auxiliary rights.





**CHAPTER IV**  
**'THE KING'S TWO BODIES':**  
**THE DUAL FUNCTIONS OF INTERNATIONAL ADMINISTRATIONS**

Membership of any association presupposes a dividing line between insiders and outsiders, a rule laying down criteria of inclusion and exclusion. The twentieth century, however, witnessed the rise of unrecognised yet effective authorities stuck in transition somewhere between an international *nihil* and statehood, including individuals, peoples under colonial rule and *de facto* regimes.<sup>475</sup> As highlighted at the 1994 Annual Meeting of the American Society of International Law,

there is an evolving, increasingly important role – at this point almost a *fait accompli* – by the sub-state entities. We have moved to a state at which, especially with respect to conflict resolution, non-state and sub-state actors are equal participants in the making of peace accords and in their implementation.<sup>476</sup>

'Unbundling' international legal personality has an undoubtedly wider significance for conceptualising membership in the international society. The propositions advanced so far fit well into an evolving legal framework that ascribes increasing capacities for non-state territorial actors to access international normative space. The imposition of international trusteeship in a post-colonial setting can therefore be presented in terms of *inclusion* in the sphere of international interest,<sup>477</sup> rather than exclusion that thrives on notions of colonial inequality. Indeed, the previous chapter argued that an international agent 'performs' the subjectivity of a non-state territorial entity. By doing so, the entity is vested with a spatio-temporal personality which is limited in scope by the *needs of the international community* rationale. The argumentative structure has utilised an inductive approach to 'constructing' legal personality. It proceeded from entitlement to agency and pointed out that international legal personality is rigorously limited by the two sets of 'interests', or preferences, that the international territorial administration must simultaneously pursue.

In all, we demonstrated that the imposition of what some commentators have termed 'neo-trusteeship' lends agency to an otherwise voiceless entity existing at the margins of an international legal *nihil*. We implicitly portrayed the temporary assumption of agency *ex lege* by a subsidiary organ of the United Nations primarily as an empowering instrument through which 'preferences' and 'interests', held by the 'people', are projected to the international plane before they have constituted themselves as a *polis*. The methodology of linking a territory to the international plane through a subsidiary organ of the UN provides evidence, in our submission, that the rules of inclusion and exclusion from membership in the organised

<sup>475</sup> For an authoritative treatment of *de facto* regimes and particularly state practice involving their inclusion in multilateral treaties see Jochen A. Frowein, *Das De Facto-Regime im Völkerrecht. Eine Untersuchung zur Rechtsstellung 'nicht-anerkannter Staaten' und ähnlicher Gebilde* (Cologne: Carl Heymanns Verlag, 1968), at 115 *et seq.*

<sup>476</sup> Steve Ratner in 'Theme Panel IV: The End of Sovereignty? Roundtable', 88 *ASIL Proceedings* 71 (1994), at 78.

<sup>477</sup> For a discussion of 'spheres of responsibility', 'spheres of abstention', and 'functional regimes' as new devices for managing international relations in the modern state system see Friedrich Kratochwil, 'Of Systems, Boundaries and Territoriality: An Inquiry Into the Formation of the State System', 39:1 *World Politics* 27-52 (1986), at 43 *et seq.*

international community are undergoing a rapid change. This transformation occurs while the notion of subjectivity in international law is partly re-conceptualised from its ideal dichotomous form in order to allow for limitations to, and degrees of, legal personality.

The introduction presented on the following pages lays open one of the key premises of the argumentative stages which lead us to explore the phenomenon of 'dual functionality'. This is necessary as we have, until now, utilised the notion of 'international community interest' in a haphazardly indeterminate manner. Drawing upon the notion of a 'standard of civilisation' that is to be shared with "people not yet able to stand by themselves"<sup>478</sup> and the socio-political arrangements devised under the Mandate and Trusteeship systems, we presented internationally-sanctioned models of territorial governance as a response to some 'social preferences' and 'collective interests'. Arguments invoking international welfare and specific versions of what *Francisco de Vitoria* termed the *bonum communae totius orbis* are always of a special quality, and it is appropriate in this context (in which the custodian function of an international administration will be discussed) to examine their premises. We briefly pose the following questions. Are there formulations of the international public interest, and how do they materialise? Secondly, if they materialise, are these legally relevant formulations or do they represent value conceptions and judgments which are of meta- or pre-juristic (namely ethical and socio-political) nature? Alternatively, does international law, as Judge *Huber* posited, represent the legal crystallisation of permanent collective interests of states?<sup>479</sup>

#### INTRODUCTION: THE ELUSIVE 'INTERNATIONAL COMMUNITY INTEREST'

The question that concerns us here is whether we can engage in reductionism about group intentions and collective 'interests' *without* complete loss of the meaning or content of the properties and interactions of the international community's constituent members. Only if we conceive that 'we-intentions' exist over and beyond interlocking 'I-intentions' toward a group, we can suggest that the *Staatengemeinschaftsinteresse* is, indeed, not tantamount to the sum of coinciding individual state interests.<sup>480</sup> In as far as the society of states conceives itself to be bound by common set of rules in their relations with one another,<sup>481</sup> it seeks to protect community values which presumably transcend the sum of values internally shared by individual members. As *Bain* notes, the notion of 'international community' asserts the superiority of a particular conception of the good life – a 'thin' conception mediated by the values of human security – over the procedural rights and duties that are associated with 'classical' international society: sovereign equality, territorial integrity, non-interference.<sup>482</sup>

<sup>478</sup> Art. 22(1) League of Nations Covenant

<sup>479</sup> Max Huber, 'Die Soziologischen Grundlagen des Völkerrechts', in *Vermischte Schriften*, vol. III (Zurich: Atlantis Verlag, 1948), at 59.

<sup>480</sup> Adapted from Alexander E. Wendt, 'The State as Person in International Relations Theory', 30 *Review of International Studies* 289 (2004), at 299.

<sup>481</sup> Cf. Hedley Bull, *The Anarchical Society. A Study of Order in World Politics* (New York: Columbia University Press, 1977), at 13.

<sup>482</sup> *Anarchy*, *supra* note 18, at 159. The debate over the distinct attributes of a 'community' versus a 'society' of states cannot be entered here. An interdisciplinary treatment of the concept of 'international community' in public international law is provided by Andreas L. Paulus, *Die internationale Gemeinschaft im Völkerrecht. Eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung* (Munich: C.H. Beck, 2001), at 45 *et seq.* Cf. also the highly interesting forum 'What is the International Community', in 132 *Foreign Policy* (2002). For a useful formulation in which 'society' and 'community' are treated as distinct forms of ideal-type social relationships, see Christoph Weller, 'Collective Identities in World Society', in *Civilizing World*

Indeed, a discernible trend from consent to consensus as the basis of international legal obligation<sup>483</sup> suggests that the aggregate *Staateninteresse* gradually transforms itself into a *Staatengemeinschaftsinteresse*.

This trend finds expression in formal organisation, the core of which is the United Nations. Recently, the Director of the UN Lessons Learned Unit provided observations concerning the establishment of international authority at the periphery. These comments invoke the notion of a loose *volonté générale* generated through the balancing of international social purposes against a cost-benefit calculus:

In opting for an international administration led by the UN, the nations of the Security Council may be sometimes signalling that there is a will to act, but a qualified will – not yet a will to act with the full force and the full cost of a lead-nation commitment, but a willingness to join with others under the UN umbrella. At other times, the Council may be making a trade-off between the capacities and efficiencies of a single-nation administration and the quasi-legitimacy invested in an administration born of the will of the wider community of governments.<sup>484</sup>

The 'international community interest' rationale (of which this thesis has spoken before) represents, in its wider context, the United Nation's guiding ideology which finds expression in formal organisation.<sup>485</sup> There, we can regularly detect no small amount of democratic teleology. An example of such commonly shared beliefs includes the notion of peace-building that the former SG *Boutros-Ghali* defined (somewhat high-mindedly) as a broad set of activities which "tend to consolidate peace and advance a sense of confidence and well-being among people", suggesting that the UN has "an obligation to develop and provide... support for the transformation of deficient national structures and capabilities, and for the strengthening of new democratic institutions".<sup>486</sup> This obligation is met, according to *Franck*, if states join in "common protective measures and institute institutional processes to secure safety, peace, and the promotion of prosperity".<sup>487</sup> The immanent tendency of 'interests' toward their realisation explains why they gradually acquire a legally relevant normative texture:

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*Politics: Society and Community Beyond the State* (ed. by M. Albert, L. Brock, K.-D. Wolf, Lanham MD: Rowman & Littlefield, 2000), at 45-68.

<sup>483</sup> Richard A. Falk, *The Status of Law in International Society* (Princeton University Press, 1970), at 177. For an early discussion of the normative significance of a '*Völkergemeininteresse*' as the reciprocal interest in the creation of a legal community see Géza Birkás, *Das Staatsinteresse als Grundlage des Völkerrechts* (Berlin: Carl Heymanns Verlag, 1933), at 74-77. Cf. also Simma's discussion of the emergence, doctrinal expressions, and the substance of community interest in 'From Bilateralism to Community Interest in International Law', *RCADI* 221-384 (1994-IV).

<sup>484</sup> David Harland, 'Legitimacy and Effectiveness in International Administration', 10:1 *Global Governance* 15-19 (2004), at 17.

<sup>485</sup> Similar Robert H. Jackson, 'International Community beyond the Cold War', in *Beyond Westphalia? State Sovereignty and International Intervention* (ed. by G.M. Lyons and M. Mastanduno, Baltimore: JHU Press, 1995), 59-83, at 62 *et seq.* As Simma and Paulus put it, "what the [UN] Charter undoubtedly did achieve was the translation of the concept of 'international community' from an abstract notion to something approaching institutional reality" ('The "International Community": Facing the Challenge of Globalization', 9 *EJIL* 266 (1998), at 274).

<sup>486</sup> *An Agenda for Peace – Preventive Diplomacy, Peacemaking and Peace-keeping: Report of the Secretary-General*, GAOR/SCOR (47<sup>th</sup>), Preliminary List Item 10, at 55, UN Docs. A/47/277 and S/24111 (1992).

<sup>487</sup> Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995), at 27.

Interessen werden...so zu Sollens-Sätzen und erhalten, mit der Weihe der Verbindlichkeit versehen, die erhöhte Chance der Verwirklichung... Die Gemeinsamkeit der Interessen findet ...bedeutsamen Ausdruck in den universellen Völkerrechtsregeln, da ihrer Bindung grundsätzlich das Vorhandensein gegenseitiger identischer Interessen zugrund liegt.<sup>488</sup>

In order to grasp the currency of this idea, we must, however, recognise the enormity of the task of ascertaining global 'community interests' and expectations over the whole range of continuously-generated putative 'norms'.<sup>489</sup> It is obvious that the complex bundle of norms and ideas underpinning contemporary international society will not necessarily be internally coherent and might even promote values in stark contradiction with each other.<sup>490</sup> It may even comprise of a number of discrete interests since this kind of normative indeterminacy is the result of a plurality of values that are not entirely convergent.<sup>491</sup> The pluralistic nature of the values simultaneously held by the organised society of states and the "conductorless orchestration of collective action and improvisations"<sup>492</sup> does not, however, preclude our employment of the term *Staatengemeinschaftsinteresse*. The intentions that the integrated community of states forms are typically restricted to the narrow domain engaged by the pluralistic purposes that its members share. There is really no reason to discount those marks of intentional subjectivity as mere 'appearances'.<sup>493</sup>

At a minimum, it appears that a legally relevant collective interest is directed towards the continuous existence of the legal community as such. The *aggiornamento* of international society requires the international public order to incorporate minimum of standards without which a *Rechtsgemeinschaft* would be unthinkable.<sup>494</sup> In its purest form, such community interest materialised, first, in the production of norms of *jus cogens* and in the emergence of new classes of acts considered punishable as crimes, namely, offences entailing the personal criminal liability of the individuals concerned.<sup>495</sup> Both set of norms can said to be "rooted

<sup>488</sup> Klein, *Statusverträge*, *supra* note 116, at 53-54. For a conceptual division of the international community's normative functions into a static body of available norms and a dynamic aspect (the procedure of rule-setting and development) see Christian Tomuschat, 'Die Internationale Gemeinschaft', 33 *AdV* 1-20 (1995), at 7-8.

<sup>489</sup> Oscar Schachter, 'Towards a Theory of International Obligation', 8 *Virginia JIL* 300-322 (1967-1968), at 316.

<sup>490</sup> Cf. David Williams, 'Aid and Sovereignty: Quasi-States and the International Financial Institutions', 26 *Review of International Studies* 557 (2000), at 558.

<sup>491</sup> Cf. Jean-Marc Coicaud, 'Conclusions', in *The Legitimacy of International Organizations* (ed. by J.M. Coicaud and V. Heiskanen, Tokyo: UNU Press, 2001), at 538.

<sup>492</sup> Pierre Bourdieu, quoted by Richard K. Ashley, 'Imposing International Purpose: Notes on a Problematic of Governance', in *Global Changes and Theoretical Challenges: Approaches to World Politics for the 1990s* (edited by E.-O. Czempiel and J. Rosenau, Lexington, 1989), at 255.

<sup>493</sup> Cf. Philip Pettit, 'Collective Persons and Powers', 8 *Legal Theory* 443 (2002), at 458.

<sup>494</sup> Cf. Huber, *Vermischte Schriften*, *supra* note 479, at 107, as well as Klein, *Statusverträge*, *supra*, note 116, at 55. For a discussion of theories that conceive the international community as formal *Rechtsgemeinschaft* see also Paulus, *Gemeinschaft*, *supra* note 482, at 89-91. For two inquiries into the nature of the 'legal interest of the community of states' cf. Christian Tomuschat, 'Obligations Arising for States Without or Against Their Will', 241 *RCADI* 195-374 (1993-IV), at 248 *et seq.* (describing the UN Charter as "world order treaty") and at 355 (defining the maintenance of international peace as the *essentiale* of the international legal order), and Jochen Frowein, 'Das Staatengemeinschaftsinteresse – Probleme bei Formulierung und Durchführung', in *Staat*, *supra* note 383, at 219.

<sup>495</sup> Cf. Antonio Cassese, *International Law* (2<sup>nd</sup> ed., New York: OUP, 2005), at 436.

in international consciousness".<sup>496</sup> Norms *juris cogentis* set material limitations to the contractual freedoms of subjects of international law – essentially removing particular legal norms from disposition in order to protect fundamental community values. Considerations superseding particular state interests – 'community interest' – are thus constituted as normatively relevant as they are protected by the prohibition to derogate from pertinent *jus cogens* norms.

This brief excursus sought to clarify that the abstract notion of 'community interest' manifests itself in a legally relevant manner, particularly in variations pertaining to obligations *erga omnes contractantes*.<sup>497</sup> Their conception invited the development, within the international legal system, of centralised institutions to ensure that responses to their violation are collective, coherent, and operate across the board.<sup>498</sup> Once these reciprocal interests acquired a permanent normative texture through processes of collective organisation and constitutionalisation, they exercise what *Franck* termed 'compliance pull'. His answer to the question – why do states obey international rules? – is that they do so because (and when) these rules are supported by the perceived needs of the global society for an orderly, peaceful community.<sup>499</sup> As we observe the expressions and manifestations of a global version of the *volonté générale* in the international system that tends to promote extra-state interests that fall outside the interplay of reciprocity, we come to understand that the organised international society performs tasks with a view to ensuring a type of collective rationality which makes its mental commons indivisible.<sup>500</sup>

<sup>496</sup> Mustafa K. Yasseen in *International Law Commission Yearbook* (1963, I), at 63, §39 (683<sup>rd</sup> mtg.), and *id.* (1966, I, Part 1), at 38-39, §29 (828<sup>th</sup> mtg.). Concerning the emergence of the notion of *jus cogens*, it suffices to recall here Articles 53 and 64 of the 1969 *Vienna Convention on the Law of the Treaties*. Terms such as 'legal consciousness of states', 'awakening of consciousness', 'universal conscience', 'common good of mankind' recurred like a leitmotif during the ILC's work on the theories of *jus cogens* and international crimes.

<sup>497</sup> Cf. Simma, 'Bilateralism', *supra* note 483, at 293-300. For the case of international environmental law see Jutta Brunnée, "Common Interest" – Echoes from an Empty Shell?, 49 *ZaöRV* 791-808 (1989), at 794 *et seq.* (carefully distinguishing between 'coinciding interests' and legally relevant 'common interests'). In this respect, we should take note of the increasing 'constitutionalisation' of obligations *erga omnes partes* and the concomitant protection of the collective interest, particularly in the area of state responsibility. Article 48 of the respective ILC Draft Articles (*infra*, note 947) is based on the idea that in case of breaches of specific obligations protecting the collective interest of a group of states (or those of the international community), responsibility may be invoked by states which are not themselves injured in the sense of Article 42. The provision intends to give effect to the ICJ's statement in the *Barcelona Traction* case, where the Court drew an "essential distinction" between obligations owed to particular States and those "owed to the international community as a whole" (ICJ Reports 1970, *supra* note 232, at 32, §33. For commentaries see James Crawford (ed.), *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries* (Cambridge: CUP, 2002), at 276-280; *id.*, *Third Report of State Responsibility*, UN Doc. A/CN.4/507/Add.4, at §§106 and 107; Linos-Alexander Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility', 13:5 *EJIL* 1127 (2002), at 1135 *et seq.*). In line with the arguments presented in Chapter III we may venture to say that the international community has become a legal person in international law within the confines of Art. 48.

<sup>498</sup> Vera Gowlland-Debbas, 'The Functions of the United Nations Security Council in the International Legal System', in *The Role of Law in International Politics. Essays in International Relations and International Law* 277-313 (ed. by M. Byers, Oxford: OUP, 2000), at 301. For a monist interpretation as to the ways in which the international legal system regulates the international public realm and integrates subsidiary legal systems, see Philip Allott, 'The Concept of International Law', 10 *EJIL* 31-50 (1999).

<sup>499</sup> Thomas Franck, *The Power of Legitimacy Among Nations* (Oxford: OUP, 1990), at 37.

<sup>500</sup> Cf. Wendt, 'Person', *supra* note 480, at 299.

To some, institution-building at the periphery is merely a reflection of the international society's 'interest' in the advancement transmitting 'standards of civilisation' in an updated version of the *mission civilisatrice*. The discussion of the international intervention in the aftermath of the Kosovo conflict (Chapter V) and of the characteristics of a transitional legal order created by an international organ (Chapter VI) suggests that the 'community interest' not only emerges from sets of strategic calculations but is based upon distinctly legal conceptions held by the international community. On the next pages, we distinguish between an international territorial administration pursuing the wider collective interest of the organised community of states and its assertion of the 'interest' of the territory *qua* its agent.

It is appropriate to add a second preliminary comment at the outset. The account presented here is heavily indebted to *Georges Scelle's* doctrine of *dédoublement fonctionnel* in international law<sup>501</sup> and aims at transposing its basic premises to international fiduciary administration. According to *Scelle*, international law attributes to national *gouvernants* and *agents* both national and international competencies. He saw the roles of national members of the executive as 'split': they act as state organs whenever they act within the national legal order, and *qua* international agents when they operate within the international legal system ('*agents exécutifs internationaux*').<sup>502</sup> In the course of the thesis, we will reversely apply *Scelle's* doctrine by focusing on an international collective organ that acts *qua* territorial agent. 'Dual functionality' will thus be utilised as an analytical device to separate the functions, and the two-tiered set of responsibilities, an international territorial administration is mandated to perform.

#### 4.1 OF INTERNATIONAL AGENTS AND ORGANS

A former senior UNTAET official recently asked: "Should the [international] mission represent the world community in the territory, or is it acting *in loco parentis* for the territory, representing its interest to the world?"<sup>503</sup> The answer to this question must in any case be that an international fiduciary administration will have to perform both functions. In the case of East Timor's transitional administration, the confusion surrounding the Mission's roles as a UN organ and territorial government complicated relations with East Timor's stakeholders and the donor community. For the purposes of the following inquiry it is worth quoting in full a paragraph from a World Bank report on post-conflict reconstruction planning:

Coordination between the Bank and UNTAET was...initially hampered by UNTAET's dual role as the United Nations Mission in East Timor and as the Transitional Administration... While the

<sup>501</sup> Cf. both his *Manuel*, *supra* note 185, at 165 *et seq.* and 'Le phénomène juridique du dédoublement fonctionnel', in *Rechtsfragen der internationalen Organisation – Festschrift für Hans Wehberg* 324-342 (ed. by W. Schätzel and H.-J. Schlochauer, Frankfurt a.M.: Vittorio Klostermann, 1956), at 331: "Les agents dotés d'une compétence institutionnelle, ou investis par un ordre juridique, utilisent leur capacité "fonctionnelle" telle qu'elle est organisée dans l'ordre juridique qui les a institués *mais* pour assurer l'efficacité des normes d'un autre ordre juridique, privé des organes nécessaires à cette réalisation, ou n'en possèdent que d'insuffisants" (emphasis in the original).

<sup>502</sup> Cassese discussed the doctrine's ideological underpinnings concisely in 'Remarks on Scelle's Theory of "Role Splitting" (*dédoublement fonctionnel*) in International Law', 1 *EJIL* 210-231 (1990).

<sup>503</sup> Peter Galbraight, 'The United Nations and Administration of Territory: The United Nations Transitional Authority in East Timor (UNTAET)', 97 *ASIL Proceedings* 210-215 (2003), at 210.

former implied mission structures and a role in anchoring and promoting the operations of UN agencies in East Timor, the latter suggested that UNTAET – as government – should establish full governmental structures and act as a government counterpart to UN agencies, [IFIs] and donors. By extension, relations between the Bank and UNTAET would be governed by their roles and mutual obligations as partners within the UN system whenever UNTAET would be seen acting as a UN mission. The usual business model would prevail whenever UNTAET was seen as acting as the 'Government'... Despite good relations...neither side had fully understood what this relationship (of the UN as Government, financed by the Bank) would entail.<sup>504</sup>

The trajectory followed in this chapter appreciates the increasing intensity with which international legal conceptions are pursued by an international custodian and how the territorial interest is being 'performed'. Its aim is to carefully distinguish between instances in which an international administration, behaving as a territorial agent, pursues 'national' (or domestic) interests, and instances in which it realises values or interests of the international community at large. After clarifying the agency and organic framework in which an international governance mission is situated, we will depart from the case of colonialism and proceed to that of military occupation. Next, the UN Council for Namibia, of whose creation this thesis spoke at the end of the second chapter, will serve as the prime example of a body with dual functions. It had the legal capacity to act on behalf of a territorial entity that was conceived as a limited, or partial, person of internal law. Its institutional quality, however, derived from it being an organ of the UN General Assembly. We conclude, somewhat speculatively, with a discussion of the nature of foreign policy in an internationalised territory and posit that under condition of ideal-type internationalisation, foreign and domestic policy are identical.

The findings should eventually support our argument, presented in Chapter V, that a Special Representatives of the UN Secretary General and his subordinate administrative authorities charged with the administration of territory are not only conceived as subsidiary organs of the United Nations. Their interrelation with domestic institutions confirms the propositions advanced in Chapter III; namely, that they are at the same time acting as agents of the territories concerned.

#### 4.1.1 AGENCY RELATIONSHIP (SUMMARY)

By exploring the origins of the concept of trust and its transposition to the international plane, we have earlier followed the theory that explains the emergence of the *fideicommissum* as a result of positive-law deficiencies, and its rigid restrictions of the *jus civile* concerning ownership and devolution of property. We attempted to demonstrate that the institutionalisation of trust as an administrative method through the two global organisations of the twentieth

<sup>504</sup> Klaus Rohland and Sarah Cliffe, *The East Timor Reconstruction Program: Successes, Problems and Tradeoffs* (World Bank Conflict Prevention and Reconstruction Unit, Working Paper No. 2, November 2002), at 15. As examples of the difficulties emerging from such dual functions, the authors mention, *inter alia*, the question of whether projects financed by the Trust Fund for East Timor (TFET) should be undertaken by a normal 'government' procurement department under IDA procurement guidelines as mandated by TFET's donors or whether UN procurement rules would apply, given that UNTAET was a UN Mission. For TFET and UNTAET's external relations role see Chapter V.2.1 (i), *infra* p. 167. Cf. also Jonathan Morrow and Rachel White, 'The United Nations in Transitional East Timor: International Standards and the Reality of Governance', 22 *Australian YIL* 1-45 (2002), at 25-30 as well as the study by the Conflict Security and Development Group (*East Timor*, *supra* note 149), which lists a number of instances where UNTAET's priorities (as a mission accountable primarily to the SC and its priorities as a government in some sense accountable to the East Timorese) came into conflict.

century had a deep impact on the application of international law to 'dependent territories'. Chapter III sought to enrich the concept of fiduciary administration with a model under which one entity delegates to another the responsibility to act as an agent on her behalf. It argued that the method of internationalisation of territory under Chapter VII of the UN Charter entails the imposition of agency through which the non-state territorial entity is represented. Since agency may possess the elements of trust and confidence of a fiduciary relation, the present analysis classified agents and trustees together as fiduciaries. By interpreting international legal instruments such as the Mandate- and Trusteeship Agreements, and even authoritative SC Resolutions establishing an international territorial administration, as devices to determine not only the scope of an agent's authority to act in the interest of the 'principal', but also his substantive obligation to ensure her interests are effectively promoted, we aimed at recasting a fiduciary relationship as an agency that is constructive of an entity's partial personality in international law.<sup>505</sup>

In order to recapitulate, we demonstrated how the performative acts of a territorial agent constitute the spatio-temporal legal personality of a non-state territorial entity which is limited in scope by the *needs of the international community* rationale. The constitution of personality is achieved (i) through an instrument of international law that abstractly addresses and 'entitles' the territory; (ii) by the 'lending of an agent/organ' through which the entity can perform its subjectivity; and (iii), via the 'discursive' mode through which the agent/organ relates the territory to the international plane. An international administration represents the territory as an agent of necessity, providing it with a conduit to the international plane.

#### 4.1.2 ORGANIC FRAMEWORK

Agency *ex lege* is, however, undertaken by an *organ* of organised international society: in the case of Namibia, by an organ of the UN General Assembly; in the case of the international administrations of Kosovo and East Timor, by a subsidiary organ of the UN Secretary-General. The legal construction of *Organleihe*, the 'lending of an organ', has recently been used to describe this international practice.<sup>506</sup> For further analysis, it is pivotal to keep in mind that a relationship of international agency is fundamentally different from the relationship between a state or an international organisation and its respective *organs*: the latter is *not* of a fiduciary nature. As Jellinek observed in 1905, there is a fundamental difference between these two legal relationships:

Der Staat kann nur vermittelt seiner Organe existieren; denkt man die Organe weg, so bleibt nicht etwa der Staat als Träger seiner Organe, sondern ein juristisches Nichts übrig. Dadurch unterscheidet sich das Organverhältnis von jeder Art der Stellvertretung. Vertreter und Vertretender sind und bleiben zwei, Verband und Organ sind und bleiben eine einzige Person.<sup>507</sup>

<sup>505</sup> The two concepts are, however, distinct. In legal literature, this distinction is sometimes expressed by noting that all trustees are agents but not all agents are trustees: a trustee is an agent and something more. See George T. Bogert, *Trusts* (6<sup>th</sup> ed., St. Paul, MN: West Publishing Company, 1987), at 36. For a recent application of both fiduciary and agency analysis to nation-building see the chapter 'Trusteeship, Paternalism and Self-Interest', in Feldman, *Iraq*, *supra* note 22, at 52-91.

<sup>506</sup> Ruffert, 'Administration', *supra* note 144, at 626-627.

<sup>507</sup> Georg Jellinek, *Allgemeine Staatslehre* ([1905] reprint of 3rd ed., Darmstadt: Wissenschaftliche Buchgesellschaft, 1960), at 546.



This is a pivotal point as it allows us to consider the application of rules governing organic associations to the relationship between the UN mother organisation and its field Mission *qua* territorial administration. Firstly, consider the delegation of powers from the Security Council to the Secretary General. Through S/RES/1244, the Council *authorised* the SG "to establish an international civil presence in Kosovo." For East Timor, the Council *decided* to establish a UN Transitional Administration (S/RES/1272). Such a specific delegation of powers does not necessarily involve the transfer of power (to the SG) *in toto*. The delegating organ does not *prima facie* denude itself of the right to exercise them.<sup>508</sup>

The second important point is that an SRSG is *not* a delegate of the SG (*delegatus non potest delegare*); he is his organ. A subsidiary organ such as a UN Mission under the leadership of an SRSG is regularly mandated to execute certain tasks, on behalf of the organisation to which it remains directly responsible.<sup>509</sup> All the various tasks performed by a subsidiary organ have one point in common: they are functions of assistance.<sup>510</sup> In the context of the Secretary-General's 'good office' role, SRSGs are conceived as surrogates for the SG, essentially as extensions of his person who do what the SG would and could do if he were personally present, carrying out their assignments under the authority given to the SG in Article 101 of the UN Charter.<sup>511</sup>

A similar surrogate role has been vested with SRSGs in their function of chief executives of UN field operations. In the late 1980s, the SRSG function metamorphosed to incorporate political and peacekeeping functions in what came to be termed 'complex emergencies'. His role was broadened to cover political affairs, civil police and administration, human rights

<sup>508</sup> This was arguably the case as the SRSG's initial sceptical approach to the FRY-FYRoM border agreement met with a strong response of the Security Council (see *infra* note 791).

<sup>509</sup> As Judge Hackworth observed in his dissenting opinion in the *Administrative Tribunal* case: "The term 'subsidiary organ' has a special and well recognised meaning. It means an auxiliary or inferior organ; an organ to furnish aid and assistance in a subordinate or secondary capacity" (*Effect of Awards of Compensation made by the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports [1954] 47, at 79). Several writers have, however, pointed out that that its subordinate nature does not imply a hierarchy of functions between principal and subsidiary organ, in the sense that the latter deals only with minor tasks. Generally, see Kelsen, *United Nations*, 1950, *supra* note 105, at 136 *et seq.* For a discussion of Article 7 of the UN Charter and a typology of subsidiary organs see Santiago Torres Bernárdez, 'Subsidiary Organs', in *Manuel sur les organisations internationales* 100-146 (Hague Academy of International Law, ed. by R.-J. Dupuy, The Hague: M. Nijhoff, 1988) as well as Paul Reuter, 'Les organes subsidiaires des organisations internationales', *Hommage d'une génération de juristes au Président Basdevant* (Paris: Pedone, 1960), at 418.

<sup>510</sup> Torres Bernárdez, 'Subsidiary Organs', *supra* note 509, at 118.

<sup>511</sup> See Donald J. Puchala, 'The Secretary-General and his Special Representatives', in *International Organization. A Reader* (ed. by F. Kratochwil and E.D. Mansfield, New York: Harper Collins College, 1994), at 278. As the UN's Legal Council noted, "[i]t is the usual practice in the United Nations to consider 'Special Representatives' and 'Special Rapporteurs' as organs of the body establishing them..." (*Opinion on the Appointment of Special Representatives*, 13 April 1992, reprinted in *The Principle of Legality in International Human Rights Institutions. Selected Legal Opinions* (ed. by B.G. Ramcharan, The Hague: M. Nijhoff, 1997), at 287 (my emphasis)). In the case of subsidiary organs established by one of the principal bodies of the UN, this responsibility may be discharged through the intermediary of the UN Secretary-General pursuant to Art. 98 of the Charter (cf. Paulus, 'Article 29', *supra* note 143, at 553). As Torres Bernárdez notes, subsidiary organs primarily assist the principal in the performance of his respective functions "with a view to facilitating the adoption/or the implementation of the decisions" of the principal. As a corollary, the functions performed by the former cannot go beyond the functions of the international organisation concerned ('Subsidiary Organs', *supra* note 509, at 141).

monitoring, humanitarian affairs and general rehabilitation and development tasks.<sup>512</sup> Attempts to make the organisation more responsible to the growing demands of peace-building were reflected in the SG's calls for a more integrated chain of command and unified reporting lines, both at UNHQ and in the field. To this effect, he gave his SRSGs more authority and instituted a system of 'integrated missions'.<sup>513</sup> However, a UN field Mission's leadership (as part of the UN Secretariat) remains accountable to the SG who exercises control over all acts unless the instrument establishing the organ stipulates otherwise.<sup>514</sup>

Discussing the relationship between the state and its organs, *Anzilotti*, in a development of *Jellinek's* thinking on the subject, noted that organs do not have a distinct identity from the state (or, applied to our case, the international organisation) which they represent:

The intent and the act of the organ...is the intent and the act of the state. It is the state itself that declares its intent and acts by means of these individuals. There is no distinction between organ and state: there are not two different subjects, one of which acts for the other; there is one single subject, the state, which declares and acts through its organs.<sup>515</sup>

Applied to the subject matter in question, it is the SG who is acting through his SRSG. A UN mission's exercise of power is hence limited to the same extent as the initial SC's delegation of power to the SG. As a corollary, the delegation of powers carries with it the concomitant responsibility for the way in which these powers are being exercised. This implies that the Security Council, through the initial delegation of powers to the SG, exercises overall authority and control over the decisions of the subsidiary organ.<sup>516</sup>

#### 4.1.3 A CUSTODIAN'S PARALLEL SET OF DUTIES

In order to synthesise the two relationships discussed so far – one of agency and one of organic quality – it proves helpful to employ a cautious analogy that centres on the temporary

<sup>512</sup> See UNDP, *Governance Foundations for Post-Conflict Situations: UNDP's Experience* (1999), at 7.

<sup>513</sup> In his 1997 *Report Renewing the United Nations: A Programme for Reform* (UN Doc. A/51/950, 14 July 1997) the SG declared that the SRSGs should be given "authority over all UN entities" in field operations. For a comprehensive discussion of the historical context cf. Espen B. Eide, *et al.*, *Report on Integrated Missions: Practical Perspectives and Recommendations* (UN ECHA Core Group, May 2005), at 10-12. Generally on the expanded role of the SRSG, see also the *Handbook on United Nations Multidimensional Peacekeeping Operations* (UN DPKO Best Practices Unit, December 2003), at 9-22.

<sup>514</sup> Cf. Torres Bernárdez, 'Subsidiary Organs', *supra* note 509, at 141. For a comprehensive discussion of the legal considerations relating to the delegation of powers by the SC to the SG to establish UN peace-keeping forces as subsidiary organs, and the limitations to their exercise by the SG, cf. Dan Sarooshi, 'The Role of the United Nations Secretary-General in United Nations Peace-Keeping Forces', 20 *Australian YIL* 279-297 (1999).

<sup>515</sup> Dionisio Anzilotti, *Corso di Diritto Internazionale* (vol. I, 1912), at 126, quoted by Sereni, 'Agency', *supra* note 427, at 639, note 5 (italics supplied).

<sup>516</sup> Sarooshi, 'Role of the UNSG', *supra* note 514, at 292. For the argument that UN peace-keeping forces are UN subsidiary organs, established by the SG pursuant to the delegation of such powers by the SC see also his 'The Legal Framework Governing United Nations Subsidiary Organs', 67 *BYIL* 413-478 (1996), at 436-438. The administrative model under the Dayton Peace Agreement is slightly more complex. As Stahn correctly notes, the High Representative in BiH is not a subsidiary organ of the United Nations, but an international agent nominated by the Steering Committee of a group of states, whose mandate has been approved by the SC ('International Territorial Administration in the former Yugoslavia: Origins, Developments and Challenges Ahead', 61 *ZaRV* 107-172 (2001), at 116).

appointment, by a municipal court, of a legal guardian. Guardianship represents an institution which is similarly grounded in the notion that the public interest is best served by an objective party which discharges both her duties towards society (as an organ of the judicial system) and her obligations towards the entity to be protected (an agent of the minor). The custodian owes a parallel set of duties both to society and to the minor. To society, the guardian ensures its interest in the well-being and proper upbringing of the minor so as to integrate him into society, but also protects society from the adverse affects of a lack of autonomous capacity (for instance, by representing the minor on the legal plane and guaranteeing the performance of any contracts he might have entered into, thereby ensuring the security of legal relations).

In an institutional analogy confirming what has previously been noted regarding the character of trust operationalised through Article 22 of the League Covenant, the Mandatory power protected both the territory and international society through performance of the fiduciary bond. The simultaneous pursuit of public and individual interests by the 'guardian' is rooted in what we term his dual functions as organ and agent. Ideally, the performance of these two roles can be accommodated where the two sets of 'interests' – public international interest and territorial interest – converge. The two functions can, however, also stand in fundamental tension with each other in case an essentially desert-based focus that the 'entitled' territory merits substantially diverges from a needs-based approach called for by the international community. In the case of divergence, dual functionality can aggravate a situation in which political authority is subject to gradual erosion. At its worst, the 'trap of dual functionality' exacerbates a dynamic that might jeopardise pursuit of the territorial interest to the same extent that it endangers the *Staatengemeinschaftsinteresse*, the collective preferences in the protection of one or more community values that underlie the strategic calculations of the international society.<sup>517</sup>

From the perspective of representation we may conclude that the internationalisation of a non-state territorial unit involves two discrete legal dimensions. Firstly, latent subjectivity is activated through 'performativity'. This dimension is inherent in the *agency framework*, expounded upon in the previous chapter, in which a particular non-state territorial entity's preferences are pursued. The second legal dimension flows from the subordinate nature of a subsidiary organ that administers territory in relation to its mother organisation. Hence, we investigated the *organic framework* through which an ancillary organ of the international organisation dispenses temporary political authority in order to carry out the functions, and meet the needs, of the international community. Itself a subject of international law that fulfils functions ancillary to those of the mother organisation,<sup>518</sup> the organ is endowed by international law with the capacity to act on behalf of a territory. The subsidiary organ/agent *ex lege* will therefore act in relation to those rights and duties vested in the territory itself *and* in relation to the mandate it has been endowed with by the mother organisation. These two discrete dimensions serve to frame the next stage of the argument which is mainly concerned with the consequences resulting from an international agent/organ's temporary pursuit of two sets of 'interest': the public international legal interest it is bound to pursue as a subsidiary organ of the organised international community and the territorial interest it is mandated to observe as agent of a non-state territorial entity. Both the dual representation

<sup>517</sup> Such instances will be discussed in the Kosovo case study in Chapter V.3.1

<sup>518</sup> Cf. Mosler, 'Subjects', *supra* note 422, at 715.

framework and the dual preference (or interest) perspective will aid our understanding of how the international legal personality of a non-state territorial unit is temporarily constructed at the intersection of municipal desert and international need. The next stage of our argument consists in applying the dual preference frame to capture more succinctly the position of an international territorial administration, a hybrid body situated in the grey zone between purely domestic and purely international authority.

## 4.2 CASES OF DUAL FUNCTIONALITY

### 4.2.1 THE 'DUAL MANDATE'

The dual functionality lens has been employed to analyse a variety of cases, particularly in the context of states that performed 'domination' or trustee obligations. Consider an example from the writing on British colonial administration which suggested that "Europe is in Africa for the mutual benefit of her own industrial classes, and of the native races in their progress to a higher plane; that the benefit can be made reciprocal, and that is the aim and desire of civilised administration to fulfil this dual mandate".<sup>519</sup> The interpretation of the 'dual mandate' of colonial administration was, no doubt, substantially different from what we nowadays identify as the key objectives of an international territorial administration. The parallels are, however, striking as we recall Lord *Lugard's* question that reflected upon England's assumption of effective control over tropical Africa's interior: "How has her task as trustee, one the one hand, for the advancement of the subject races, and on the other hand, for the development of its material resources for the benefit of mankind, been fulfilled?"<sup>520</sup>

The 'dual mandate' which *Lugard* expounded and popularised – an essentially progressive outlook – was given clearer and more solemn expression through the League Covenant's operationalisation of the principle of the 'sacred trust' as a basis for a new system of international supervision devised for the former enemy territories.<sup>521</sup> Substituting the enlightened self-interest of a colonial administration with the *Staatengemeinschaftsinteresse* outlined above, we can draw fundamental parallels with the practice of a fiduciary administration whose functions are performed both towards the metropolitan core and the periphery. As the High Court of the Trust Territory of the Pacific Island held in 1967,

The Trust Territory...appears to be quite definitely of a dual nature. It is certainly the means by which the United States carries out the major part of its responsibilities as administering authority under the Trusteeship Agreement and its activities are included in the annual reports of the [US] administration of the territory made by the [US] to the Trusteeship Council. Furthermore the Trust Territory Government seems clearly intended to come within the meaning of the words "such agency or agencies as the President of the [U.S.] may direct or authorize" as used in 48 USC 1681(a) in providing for the Government of the area. The Trust

<sup>519</sup> Frederick D. Lugard, *The Dual Mandate in British Tropical Africa* (Archon Books, [1922] 1965), at 617.

<sup>520</sup> *Ibid.*, at 606. For a brief discussion of the powerful impact of Lugard's 'dual mandate' principle cf. Bain, *Anarchy*, *supra* note 18, at 58-63.

<sup>521</sup> Cf. Hall, *Mandates*, *supra* note 177, at 33. The transposition of the 'sacred trust' conception from colonial possession to Mandate administration is well discussed in Charles H. Alexandrowicz, 'The Juridical Expression of the Sacred Trust of Civilization', 65 *AJIL* 149-159 (1971).

Territory appears to act sometimes as part of the Department of Interior and sometimes as a separate, though subordinate, body having a will on its own...<sup>522</sup>

Not unlike colonial and protectorate administrations,<sup>523</sup> an international fiduciary administration will have to simultaneously pursue the interests of the 'metropolitan core' as well as represent the interests of a non-self-governing territorial unit. These two functions have, in the case of Mandate administration, been in conflict with each other. In his in-depth analysis of the 1919 Nauru Island Agreement, signed by the three future mandatories – the UK, Australia and New Zealand – establishing the British Phosphate Commissioners, Weeramantry concludes that a clear contradiction between the duties and interests of the three governments acting through their appointed representatives became the legal basis for the administration of the phosphate industry for nearly 50 years: "[I]t will be self-evident that the interests of the three mandatories in obtaining phosphate at the lowest possible price clashed with the interests of the Nauruans in obtaining the best possible price for their product."<sup>524</sup> Moreover, the Commissioners not only acted as suppliers but as agents for the purchasers of superphosphates in New Zealand and Australia – a practice that had already been repeatedly criticised by the League's Permanent Mandates Commission.<sup>525</sup>

#### 4.2.2 THE ALLIED CONTROL AUTHORITY

Aspects of dual functionality have not only been observed in the colonial or Mandate context. The identity of the Allied Control Authority has also been described as dual – it represented a German as well as an Allied representative organ and as such it acted as trustee, representing German interests while its trusteeship responsibilities emerged not from a explicit trusteeship title but through the *Sequestrationsbesetzung*: the assumption of supreme authority following the Berlin Declaration of 5 June 1945<sup>526</sup> and its exercise in the interest of the 'sequestered' territory that lasted until the re-institution of autonomous organs that would be vested with full powers. From the outset, the Allied Powers made it clear that the acts of the German occupation authorities were in law attributable not to the Allied States but to the State of Germany "which is accordingly deliberately maintained in being a legal person", with the occupation authorities constituting the German government, whether acting jointly or individually.<sup>527</sup> This view was later confirmed in a memorandum of the Legal Advisor's Office of the State Department which opined that

<sup>522</sup> *Alig v. Trust Territory of the Pacific Islands*, [1967] High Court, Appellate Division, 61 ILR 88, at pp. 93-94 and 96-97, quoted by Erades, *Interactions*, *supra* note 450, at 444.

<sup>523</sup> The 'dual functions' of the protectorate executive, being on the one hand the political agent representative of the protecting state (and thus of the contracting of the protectorate treaty), and at the same time the single and supreme authority within the protectorate, are briefly discussed by Kamanda, *Protectorates*, *supra* note 440, at 159-160.

<sup>524</sup> Christopher Weeramantry, *Nauru: Environmental Damage under International Trusteeship* (Melbourne: OUP, 1992), at 57.

<sup>525</sup> *Ibid.*, at 104-122. For Nauru's claim for restitution *in integrum* see the case concerning *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, ICJ Reports [1992], at 240 *et seq.*, as well as the respective ICJ Pleadings, Oral Arguments, Documents, vol. I (The Hague, 2003), at 17-18.

<sup>526</sup> Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority with Respect to Germany, reprinted in Ingo von Münch, *Dokumente des geteilten Deutschland* (Stuttgart, 1961), at 19. Frowein provides a succinct summary in 'Potsdam Agreements on Germany (1945)', in 3 *EPIL* 1087-92 (1997).

<sup>527</sup> R.Y. Jennings, 'Government in Commission', 23 *BYIL* 112 (1946), at 122.

there was from the time of the conquest a military government of the Allies, distinct from the governments of their respective countries though unilaterally receiving instructions from those countries... The [governments of the four powers] were neither individually nor collectively the government of Germany. There was a distinct government of Germany, even though it was not German in personnel or origin....<sup>528</sup>

This legal construction thus secured the continuity of the German state, regardless of its *debellatio*.<sup>529</sup> Grewe built on this opinion when he argued that

[d]ie Besatzungsmächte, repräsentiert durch ihre Kontrollorgane, nehmen damit eine eigenartige rechtliche Doppelstellung ein: sie üben einerseits die militärische Besatzungshoheit in Deutschland aus, die ihnen nach überliefertem Völkerrecht in den Schranken der Haager Landkriegsordnung zusteht... Daneben besitzen sie andererseits die deutsche Staatshoheit in allen ihren Funktionen, die sie durch die Berliner Erklärung an sich genommen haben.<sup>530</sup>

The dual quality of the Control Authority as an organ of military occupation on the one hand, and an agent administering the German *Staatshoheit* on the other, was recognised by the *Conseil d'État*. In a series of decisions it held that the French occupation authorities exercised powers attributable to the government of Germany and not to the French state.<sup>531</sup> Similarly, the British Government stated that, for the purposes of the United Kingdom Immunity Act of 1878, the persons to be regarded as the government of Germany included

<sup>528</sup> Memorandum of 13 July 1950 quoted in M.M. Whiteman, *Digest of International Law* (vol. II, Washington, D.C.: G.P.O., 1963), at 794.

<sup>529</sup> *Debellatio* is defined as a process "whereby armed conflicts are terminated unilaterally by the destruction of a party to the conflict as an independent organised entity" (Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals* (vol. II, London, Stevens & Sons, 1968), at 730. For arguments supporting the continuity of the German state see Wilhelm Grewe, *Ein Besatzungsstatut für Deutschland. Die Rechtsformen der Besetzung* (Stuttgart: K.F. Koehler, 1948), at 16 and 17. Similar: Max Rheinstein, 'The Legal Status of Occupied Germany', 47 *Michigan LR* 23 (1948), at 25 *et seq.* (who refers to the "dual position of the occupying powers", at 27); Erich Kaufmann, *Deutschlands Rechtslage unter der Besetzung* (Stuttgart: K.F. Koehler Verlag, 1948), at 11-15 (arguing that Germany was *rechtsfähig* but not *handlungsfähig*); and Rolf Stödter, *Deutschlands Rechtslage* (Hamburg: Rechts- und Staatswissenschaftlicher Verlag, 1948), at 82 *et seq.*

<sup>530</sup> Grewe, *Besatzungsstatut*, *supra* note 529 (with reference to the Berlin Declaration of 5 June 1945), at 82-83. See also Kaufmann, *Rechtslage*, *supra* note 529, at 28-29 (arguing that conflicts arising from the 'duplicity' of the position of an occupation force would be unavoidable). Like Grewe and Kaufmann, von Laun presented convincing arguments that *qua* military victors, the occupying powers exercised effective control over the territory which simultaneously constituted the government of Germany. The Control Council was a German as well as an Allied representative organ and as such it acted as trustee; i.e., represented German interests ('The Legal Status of Germany', 45 *AJIL* 267 (1951), at 284 *et seq.*).

<sup>531</sup> This point is made by I.D. Hendry and M.C. Wood, *The Legal Status of Germany* (Cambridge: Grotius Publications, 1987), at 55, referring to the judgments of 29 June 1951 (*Société Bonduelle* case); 21 November 1952 (*Association pour reconstruction à Paris et à Metz du monument du général Mangin* case); 10 July 1954 (*Kelm* case); 15 December 1954 (*Roucante* case) and 15 June 1955 (*Groupement des scieurs alsaciens et mosellans* case). The Conseil had earlier declined jurisdiction in cases concerning organs acting on behalf of another entity. In *Re Lurin* the Conseil dealt with the High Commissioner of the French Republic in Syria and the Lebanon who had dismissed an inspector of the Merchant Navy and Fisheries who, in turn, applied for the order to be cancelled. The Conseil concluded that it had no jurisdiction: "Such an order is not an act of a French administrative authority capable of being reviewed by the Conseil d'Etat". (11 AD no. 32, 12 October 1939, at 51, quoted by Erades, *Interactions*, *supra* note 450, at 441).

the members of the Allied Kommandatura Berlin and the British Military Commandant.<sup>532</sup> The functions of the allied control machinery were seen to include, firstly, that of the national government of Germany, and secondly, that of an agent jointly acting on behalf of the four Powers.<sup>533</sup> The recognition of the dual functions of an organ of military occupation had, in any case, important implications for delineating the obligations the Authority was subjected to. As Grewe pointed out in his remarkable study, the simultaneous exercise of those two functions predicated the assumption of a dual set of obligations by which the Control Authority was bound.

Während die militärische Besatzungshoheit, die der Verfolgung der „militärischen Notwendigkeiten“ (*nécessités militaires*) der Okkupationsmächte dient, in ihrem *eigenen Interesse* und nur mit einer im Völkerrecht, insbesondere in der HLKO, fixierten Rücksicht auf die deutsche Bevölkerung auszuüben ist, ist die den Kontrollorganen übertragene deutsche Staatshoheit umgekehrt *im Interesse der deutschen Bevölkerung*, wenn auch zugleich mit Rücksicht auf die Ziele der Besatzungspolitik wahrzunehmen.<sup>534</sup>

Hence the notion of temporary trustee occupation that the Control Authority undertook to perform in its second function as agent of the German government.<sup>535</sup> The wider point here concerns the structural similarities between the condition of dual functionality in the case of occupied Germany and the 'de-sovereignising' effects of the application of the concept of trust with which we commenced our debate of the Versailles Treaty in Chapter II. The machinery of Article 119 of the Treaty employed to transfer the former German and Ottoman territories to the Mandatory Powers provides an instructive analogy. Like the fiduciary arrangements made in 1919, the Berlin Declaration studiously avoided any reference to 'sovereignty'.<sup>536</sup> It spoke only of an assumption of 'supreme authority' (*oberste Regierungsgewalt*) which is not without qualification: it is assumed by the occupying powers for the stated purpose of preparing "for an eventual reconstruction of German political life on a

<sup>532</sup> Certificate of the Secretary of State for Foreign and Commonwealth Affairs dated 17 September 1984 issued in connection with the case of *Trawniki v. Lennox* [1985] 1 W.L.R., at 532, printed in 55 BYIL 525 (1984).

<sup>533</sup> Jennings, 'Commission', *supra* note 527, at 140.

<sup>534</sup> Grewe, *Besatzungsstatut*, *supra* note 529, at 87 (italicised in the original).

<sup>535</sup> The idea that all occupants are in some vague sense trustees is not new. Sir Arnold Wilson first suggested that "enemy territories in the occupation of the armed forces of another country constitute...a sacred trust, which must be administered as a whole in the interest both of the inhabitants and of the legitimate sovereign or the duly constituted successor in title" ('The Laws of War in Occupied Territory', 18 *Transactions of the Grotius Society* (1933), at 38). Similarly, Sauser-Hall described the German situation as comparable to a *tutelle temporaire* in which the military government would act "à la manière d'un comité de tuteurs, ou de trustees" ('L'occupation de l'Allemagne par les Puissances Alliées', 3 *Annuaire suisse de droit international* 9-63 (1946), at 36). The idea that a fiduciary bond operates in occupation law has been advanced (albeit on a fairly unsubstantiated basis) in order to exclude the application of all provisions of the law on occupation (and specifically the 1949 Geneva Conventions) in cases such as the Israeli occupation of the West Bank. See Allan Gerson, 'Trustee Occupant: The Legal Status of Israel's Presence in the West Bank', 14 *Harvard ILJ* 1-49 (1973).

<sup>536</sup> Kelsen shared the contrary – indeed contested and, it is submitted, mistaken – view, arguing that German territory, together with its population, has been placed under the 'joint sovereignty' of the four Powers after its existence as a sovereign state had been destroyed and after *debellatio* entailed the destruction of "the existence of Germany as a sovereign state" ('The International Legal Status of Germany to be Established Immediately Upon Termination of the War', 38 *AJIL* 689 (1944). See also his 'The Legal Status of Germany According to the Declaration of Berlin', 39 *AJIL* 518 (1945), at 522).

democratic basis and for [its] eventual peaceful cooperation in international life".<sup>537</sup> Similar to the concept of fiduciary administration employed at the end of WWI, the Allies had, in the aftermath of WWII, assumed supreme authority in order to impose upon Germany a special and temporary regime without prejudice to the ultimate disposal of German territory and government. While its occupation went beyond the letter of the Hague Regulations, it fell short of the annexation or assumption of sovereignty.<sup>538</sup>

(1) *BONA FIDE REPRESENTATION BY THE OCCUPYING POWER*

Once the fiduciary functions of the occupant are ascertained, certain legal consequences flow from it. They chiefly pertain to the preservation of the economic structure and capital assets of the occupied territory and its *bona fide* representation in external affairs.<sup>539</sup> The discussion of double functionality in the case of Germany's occupation has direct implications for our wider conclusions regarding the dyadic sets of interests a temporary governance regime is bound to pursue. We attempted to demonstrate that an organ temporarily vested with supreme authority over territory, needs to strike a difficult balance between *nécessités militaires* and the imperatives that flow from the fiduciary character of such a temporary regime. As a direct consequence of the dual functions of an international administration vested with supreme authority, those imperatives – what is, and what is not in the interests of the administered people – are determined by the same organ that would arrive at such determination as the territory's agent. The special *problématique* of the fiduciary sequestration of state power and its implication for the limitations to arbitrary rule was expanded upon by Grewe, and is worth quoting in full:

Wenn die sequestrierte deutsche Staatsgewalt auch im Interesse der deutschen Bevölkerung auszuüben ist, so entscheiden...doch nicht deutsche Instanzen, sondern...die Besatzungsmächte darüber, was als im Interesse des deutschen Volkes liegend zu erachten ist. Darüber können die Meinungen auseinandergehen, sowohl zwischen den Besatzungsmächten und der deutschen Bevölkerung als auch zwischen den Besatzungsmächten untereinander. Aber wenn es auch in das Ermessen der Besatzungsmächte gestellt ist, welche gesetzgeberischen, administrativen und wirtschaftspolitischen Maßnahmen im wahren deutschen Interesse erforderlich sind, so hat doch jedes Ermessen seine unübersteigbaren Schranken. Ermessensmißbrauch und Ermessensüberschreitung (*détournement de pouvoir*) sind verboten.<sup>540</sup>

<sup>537</sup> Protocol of the Proceedings of the Berlin Conference of 2 August 1945, House of Commons Accounts and Papers, XXIV, 1946-47 (London, 1947), at 4, quoted by Richard L. Merritt, *Democracy Imposed: U.S. Occupation Policy and the German Public, 1945 – 1949* (New Haven: Yale UP, 1995), at 270.

<sup>538</sup> Adam Roberts, 'What Is a Military Occupation?', 55 *BYIL* 249 (1985), at 269.

<sup>539</sup> Cf. Articles 42-56 of the Hague Regulations of 1907 that regulate the *occupatio bellica*. For their partial application in the transition to an *occupatio pacifica*, see the discussion by von Laun, 'Status', *supra* note 530, at 274, and by Grewe, *Besatzungsstatut*, *supra* note 529, at 118 *et seq.* Grewe convincingly held that "trotz des vollständigen politischen und militärischen Zusammenbruchs des Reiches befindet sich das besetzte Deutschland seit 1945 nicht im Zustande der absoluten Rechtlosigkeit gegenüber den Besatzungsmächten... Die Annahme..., Deutschland hätte sich durch die „bedingungslose Kapitulation“ aller Rechte und Rechtsschutzpositionen und jeder Rechtsfähigkeit überhaupt begeben, entbehrt jeder juristischen Begründung" (at 148-149). The majority of court decisions at the time, however, held that the Allied occupation after Germany's surrender was not subject to the Hague Regulations. For a brief listing of cases see Morris Greenspan, *The Modern Law of Land Warfare* (Berkeley/Los Angeles: University of California Press, 1959), at 215.

<sup>540</sup> Grewe, *Besatzungsstatut*, *supra* note 529, at 152.



A general observation, based on our earlier conclusions, would therefore posit this fiduciary function at the precise intersection of the *Staatengemeinschaftsinteresse* (defined in the case of German occupation as the pursuit of military necessities) and what we have termed 'territorial interest'. A fiduciary administration's function as the territory's agent will naturally have to take account of the interests of the entity *in statu nascendi*. As supreme bearer of German *Staatshoheit*, the Control Council was an inter-Ally organ of occupation which grounded its claim to effective control in the fiduciary duties of the occupant. It hence exercised the *functions* of a German government; it issued German laws and the acts of its executive branch were acts of the German state. As a dependent territory, Germany remained capable of relations with third parties and continued to bear rights and duties. For the external representation of the territory, the 'sequestration' of German government meant that the Allied Powers were able to enter into treaties with third states for the period of the occupation, on behalf of the territory they represented as agents.<sup>541</sup>

The dual functions of the Allied Powers in the external field are most visible when we recapitulate the practice of the Military Governors of the British Zones of entering into economic cooperation treaties with the British government, which anticipated their registration by the UN Secretariat.<sup>542</sup> Applying the framework developed in the previous chapter's focus on external representation, Germany's foreign relations were conducted by means of the machinery provided by the Allied powers as *agents of necessity* through which government was carried out.<sup>543</sup> Their performance of a fiduciary bond constituted Germany's spatio-temporal legal personality under Allied occupation.

The arguments developed here, seeking to relate an entity's partial international personality to the performance of a fiduciary bond by an international agent, are highly relevant to Namibia's decolonisation process. Two caveats apply, however. Firstly, we do not seek to equate the functions of a military occupation power with those of a 'benign' international trustee who of course operates beyond the imperatives of military necessity. Secondly, the Allied Control Council's exercise of powers was not tied into a machinery of international accountability, as the UN Council for Namibia's performance was. The task in the next section is therefore restricted to exploring structural, rather than substantive, similarities of the 'dual functions' of an international organ/agent temporarily administering territory.

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<sup>541</sup> The principles governing the conduct of foreign affairs were set forth in Control Council Proclamation No. 2 (20 September 1945): "The Allied Representatives will regulate all matters affecting Germany's relations with other countries. No foreign obligations, undertakings or commitments of any kind will be assumed or entered into by or on behalf of German authorities or nationals without the sanction of the Allied Representatives" (cited by Jennings in 'Commission', *supra* note 527, at 126).

<sup>542</sup> Abkommen über wirtschaftliche Zusammenarbeit (14 July 1948), quoted by Hermann Mosler, 'Ein Besatzungsstatut für Deutschland' (review of Grewe's book), 75:4 *AdV* 382 (1945), at 383.

<sup>543</sup> The effect of the Berlin Declaration was considered by the English courts in the case of *Rex v. Bottrill, Ex parte Kuechenmeister* [1946] 1 *All E.R.* 635 (K.B.), affirmed by the Court of Appeal [1947] 1 K.B. 41. In the course of the proceedings, the Court was furnished with a certificate from the British Secretary of State for Foreign Affairs which stated that the "Allied Control Commission are the agency through which the Government of Germany is carried on".

### 4.3 THE UN COUNCIL FOR NAMIBIA

The novel developments that were set in motion by the establishment of the UN Council for Namibia can only be appraised in light of the fundamental change of approach to international legal rules which accompanied the operationalisation of the Mandates system. As submitted in Chapter II, the Mandate system necessitated departure from the classical rules of international law if only because the system postulated the new status of two sorts of *potestates* hitherto not recognised in international law. These were, on the one hand, the individual human being exercising her collective right to self-expression, and, on the other hand, the organised international authority as it expresses the collective will of the world community. As the Court gave judicial recognition to the nexus established by the General Assembly between the inchoate 'sacred trust' concept and a contemporary definition of self-determination, it cleared out the normative space through which these two legal persons could become in direct contact with each other.

The UN Council for Namibia – which represented both the inhabitants of a dependent territory as an agent of necessity, and the will of the organised international community as a UN organ – embodies an instance in which these two new legal personalities connected within a normative framework consisting of both municipal and international dimensions. On an institutional level, the creation of the UN Council for Namibia represented the vehicle mandated to effectuate Namibia's legitimate claim to self-determination by sequestering the trust that South Africa had disavowed with regard to the territory:

L'istituzione, da parte dell'Assemblea generale nel 1967, del Consiglio delle Nazioni Unite per il Sud-Ovest africano...costituisce il *logico corollario* della dichiarazione di cessazione del mandato esercitato dall'Unione del Sudafrica, e dell'assunzione di una responsabilità diretta da parte dell'ONU per l'amministrazione del Territorio.<sup>544</sup>

International law, it seemed, had given birth to a new relationship between a territory and its inhabitants<sup>545</sup> without an intervening level of state sovereignty. One way of understanding the activities of the UN exercising, through its subsidiary organ, the functions of a territorial government, is through the prism of a novel link between the territory – entitled, as it was, to the exercise of a right – and the organised international community to which the territory sought access. The UN Council for Namibia appears to have discharged these responsibilities in its dual capacity.<sup>546</sup>

This duality of status had been conferred by the General Assembly which specified the functions the Council should exercise, firstly, as a policy-making organ of the United Nations<sup>547</sup> responsible to the GA for the over-all exercise of its functions and powers,<sup>548</sup> and those it should undertake as Namibia's legal administering authority. In this latter capacity, the UN Council acted on behalf of a territorial entity for which it had assumed responsibility.

<sup>544</sup> Barsotti, 'Amministrazione diretta', *supra* note 316, at 55 (italics supplied).

<sup>545</sup> Cf. McNair, ICJ Reports 1950, *supra* note 173, at 150.

<sup>546</sup> For a similar conclusion see Zacklin, 'Problem', *supra* note 330, at 309.

<sup>547</sup> Cf. A/RES/32/9F, *supra* note 325, at §2(f).

<sup>548</sup> A/RES/2372, *supra* note 340, at §3.

In the former capacity, it exercised its powers on behalf of the organised community of states.

This duality of status had been confirmed by a number of UN pronouncements.<sup>549</sup> The series of GA Resolutions adopted regarding the 'Situation in Namibia' made regular reference to the Council's organic function – e.g., monitoring of the boycott of South Africa submitting reports to the GA.<sup>550</sup> As already noted in Chapter II, the legal fiction of recognising the Council in its two roles continued to operate not only in the framework of the internal workings of UN organs.<sup>551</sup> In addition, GA Resolutions addressed the functions which the Council should undertake "as the legal Administering Authority for Namibia until independence"<sup>552</sup> – e.g. the "promulgation of additional legislation in order to...promote the interests of the people of Namibia"<sup>553</sup> or the Council's representation function in international organisations.<sup>554</sup> Its admission to membership of international organisations was not effectively challenged on grounds of incompatibility with its status as a United Nations organ and/or the legal Administering Authority of a territory. After all, it was not the *Council* but the *territory* that was granted associated or full membership of these organisations, as *represented by the Council*.<sup>555</sup>

This provides evidence for, and lends plausibility to, the argument that an internationalised territory vested with an organ to discharge its international rights and obligations, does indeed possess a partial legal personality to the extent that its (and the international community's) needs can be better served. With equal force, one may take the argument one step further and suggest that, given the relevant *public international legal interest*, temporarily internationalised territories are capable of seeking membership of international organisations through an international organ. The instance of Namibia's accession to international organisations showed that, firstly, an international organ's mediating activities through which a territory is granted access to the international plane is not incompatible with the former's status either as an organ of the United Nations or as the *de jure* administering authority and agent *ex lege* of a territory. This argument is even more convincing if the international administering authority has effective control over a non-state territorial entity to which the benefits of participating in international life directly accrue.

<sup>549</sup> Cf., e.g., the statement of the President of the UN Council for Namibia during the 1584<sup>th</sup> meeting of the UN Security Council, especially §78, in Djonovich, *Resolutions*, Vol. VIII, *supra* note 318, at 362. This has led von Lucius to observe: „Der [Namibia] Rat unterscheidet sich von anderen Unterorganen der Vollversammlung: Er ist...zugleich, in einer Art *Doppelkapazität*, die gesetzmäßige Verwaltungsinstantz für ein Territorium“ ('Die Vereinten Nationen und die Beschlagnahme Urans aus Namibia', in *Festschrift für Wolfgang Zeiler* (vol. II ed. by W. Fürst, 1987), 1939-1962, at 1953 (my italics)).

<sup>550</sup> A/RES/42/14 (42<sup>nd</sup>), *supra* note 326, section A §80.

<sup>551</sup> For the participation of the President of the Council for Namibia in the meetings of the Security Council see, e.g., SCOR (XXVII), 1628<sup>th</sup> meeting, 28 January 1972.

<sup>552</sup> A/RES/32/9F, *supra* note 325. Cf. Osieke, 'Membership', *supra* note 326, at 193, as well as Junius, *UN Council*, *supra* note 226, at 48-51.

<sup>553</sup> A/RES/42/14, *supra* note 326, section A §77.

<sup>554</sup> *Id.*, section C §7 *et seq.* Cf. also A/RES/3295 (XXIX), 13 December 1974, section VI(1), which requests international organisations and conferences "to take such steps as will enable the UN Council for Namibia to participate fully, on behalf of Namibia, in the work of those agencies and organisations".

<sup>555</sup> Cf. Chapter II.2.3 (iii), *supra* p.86.

#### 4.3.1 NORMATIVE CONTENT OF THE COUNCIL'S DECREE...

The UN Council for Namibia was positioned at the interface between international and municipal law. By applying the dual functionality frame to the Council's legislative pronouncements, we seek to demonstrate that the normative content of its decrees has differed, depending on whom the norm was addressed to ('target audience'). This becomes immediately apparent when we turn to the areas in which the UN Council for Namibia legislated. Having obtained jurisdiction over the territory by the GA, the UN Council adopted *Decree No. 1 for the Protection of the Natural Resources of Namibia* on 27 September 1974.<sup>556</sup> The instrument was adopted despite considerable scepticism on the part of many member states who had already doubted the grant of overall legislative power under GA Resolution 2248 (S-V)<sup>557</sup> or who failed to see how such power could be enforced in the absence of effective control over the territory. Addressed directly to persons and entities,<sup>558</sup> the Decree stated that consent of the Council would be required for any exploitation of Namibia's natural resources,<sup>559</sup> and that resources removed without such consent could be seized,<sup>560</sup> including the carrier, vehicle, ship or container in which resources would be transported,<sup>561</sup> hence infusing an element of uncertainty into dealings with South Africa concerning the disputed resources. Any person, entity, or corporation which violated the Decree "may be liable for damages by the future government of an independent Namibia".<sup>562</sup> As indicated in the text of the Decree, the Council entrusted the implementation of this enactment to the UN Commissioner for Namibia.<sup>563</sup>

In what can be seen as another phase in the gradual emergence of legal personality of an internationalised territory, the instrument purported to have direct legislative impact inside Namibia and internationally. This enforces the preliminary conclusion that the GA had created an entity capable of raising issues which may only be raised by states possessing international legal personality. Prior to making such wide-reaching conclusions about the extent of legal personality, the nature of the decree must be determined. Due to the dual nature of the competent legislating organ, questions about the decree's position in normative space (*Rechtsstufe*) are pertinent; so is the issue of whether the instrument had any normative content at all, and if yes, on what level.

##### (i) ...WITHIN THE UNITED NATIONS LEGAL ORDER

A first approach to investigating the Decree's normative content under international law

<sup>556</sup> The Decree was endorsed in A/RES/3295 (XXIV), *supra* note 326, reprinted in 13 *ILM* 1513 (1974). It requested member states to take all appropriate measures to ensure its full application and compliance.

<sup>557</sup> A/RES/2248 (S-V), *supra* note 124, pt. II(b), charged the Council to "promulgate such laws, decrees and administrative regulation as are necessary for the administration of the Territory until a legislative assembly is established following elections conducted on the basis of universal adult suffrage". Chapter 1.2.1 (i) (*supra* p. 36) provided an account of the confusion regarding the correct legal basis of A/RES/2248 (S-V).

<sup>558</sup> Not to states, see Decree No. 1, *supra* note 556, §1.

<sup>559</sup> Animal and mineral resources, *ibid.*, §1.

<sup>560</sup> *Ibid.*, §4.

<sup>561</sup> *Ibid.*, §5.

<sup>562</sup> *Ibid.*, §6.

<sup>563</sup> For the role of the 'Commissioner for Namibia' (to be organisationally distinguished from the Council) see Junius, *UN Council*, *supra* note 226, at 52-53.

delimits the UN Council's competencies as a subsidiary organ of the GA. Since *nemo plus iuris (ad alium) transferre potest, quam ipse habet*, the Assembly could not have delegated to one of its organs powers greater than those possessed by her. Since the GA cannot take binding decisions vis-à-vis member states, Resolution 2248 (S-V) cannot, from a constitutional point of view, be interpreted to mean that the Council was empowered to make laws and regulations that would have bound member states in either their domestic legal order or in relations between states.<sup>564</sup> Zacklin ascribes to the Resolution an 'operative design' that remained contingent upon further implementing action by the member states, therefore essentially attributing to it the normative content that a General Assembly resolution to member states would normally possess.<sup>565</sup> Within the UN's internal legal sphere, the functions *qua* constitutional authority of the Council – grounded as they were in the UN Charter, various resolutions of the UN GA and SC – related to the administration of the territory until it achieved independence. It is proposed here to agree with Zacklin who argued that

[w]ithin the Organisations' internal legal order then, the Council for Namibia must be regarded as the sole authority with the power to legislate for Namibia, there being no other authority recognised as such since the termination of the Mandate.<sup>566</sup>

This implies that as long as the Council acted *infra vires* (primarily by not infringing upon the Security Council's authority to impose sanctions), its decisions regarding Namibia applied within the legal order of the UN.<sup>567</sup> As Schermers puts it,

[the GA] can take decisions, binding on Namibia, as it can take decisions binding on its subsidiary organs ... [T]his means that UN decrees on Namibia are part of a legal order separate from that of the members of the UN, but not necessarily superior to it.<sup>568</sup>

## (II) ...WITHIN THE DOMESTIC LEGAL ORDER OF STATES

The Council for Namibia had to look to the courts and authorities of the respective UN member states for the Decree's enforcement. Within the legal order of member states, the instrument was regarded as similar to the lawful acts of a foreign authority. It was subject to the 'public policy' test which, given the vagueness of the notion, clearly left wide discretion to the national courts whether to apply foreign acts of a public nature.<sup>569</sup> Based on *ordre public* considerations, the Decree's ineffectivity was therefore assured almost from the beginning as the major Western states refused to recognise its validity, or the legislative and adminis-

<sup>564</sup> For a discussion of the applicability of the Decree in relations between states, and the invalid legal basis of acts contravening the Decree cf. Schrijver, 'Urenco', *supra* note 314, at 40.

<sup>565</sup> Zacklin, 'Problem', *supra* note 330, at 320-21, with reference to the 'operative design' doctrine developed by the ICJ in the *Legal Consequences* opinion, ICJ Reports 1971, *supra* note 56, at 50. For a similar conclusion see Schrijver, 'Urenco', *supra* note 314, at 38.

<sup>566</sup> 'Problem', *supra* note 330, at 321. Similar: Henry G. Schermers, 'The Namibia Decree in National Courts', 26 *ICLQ* 81-96 (1977), at 88.

<sup>567</sup> That would have meant, for instance, that UNDP or the World Bank could not grant any loans to South Africa to assist the exploitation of natural resources in Namibia. For an analysis of the limitations of other UN specialised agencies by the Decree see Schrijver, 'Urenco', *supra* note 314, at 39-40.

<sup>568</sup> 'Namibia Decree', *supra* note 566, at 89. Junius derived from the 'organic' status of the UNCTF in the internal legal order of the UN the obligation to recognise it as sole representative and administrator of the territory (*UN Council*, *supra* note 226, at 119 and 124-128).

<sup>569</sup> This is essentially the conclusion of Schermers, 'Namibia Decree', *supra* note 566, at 90.

trative competence of the UN Council of Namibia to proclaim it.<sup>570</sup>

The general rules covering governments-in-exile (whose status is recognised by the international community yet not by the illegal authority *in situ*), who are usually not permitted to enforce their laws themselves within the territory of another state,<sup>571</sup> were deemed to apply in this case.<sup>572</sup> In line with these considerations in 1986, the German federal government declined to recognise that the Decree would have a binding effect in international law and concluded that the government would not be in a position to transform it into municipal law. The question of whether an international obligation arising under the Charter automatically creates a domestic legal obligation without specific domestic legislation was therefore, in application of the 'dualist' doctrine, answered negatively in the case of Germany.<sup>573</sup>

### (III) ...WITHIN THE NAMIBIAN LEGAL ORDER

Barsotti generally submits that the normative effects of legal pronouncements of the UN Council varied according to the respective organisational identity the Council assumed:

Le norme giuridiche prodotte dal Consiglio nell'esercizio della propria competenza a stipulare presentano non indifferente rilievo per un duplice ordine di motive. In prima luogo, perché sono l'espressione del riconoscimento concreto, da parte degli Stati, del ruolo di ente di governo della Namibia attribuito al Consiglio. In secondo luogo, perché impongono precisi vincoli giuridici agli Stati contraenti, obbligandoli ad assicurare la loro cooperazione per il

<sup>570</sup> For a discussion of the Act of State doctrine which served as a defence against inquiry into the validity of the title to resources removed with the authorisation of the South African administration see George R. Shockey, 'Enforcement in United States Courts of the United Nations Council for Namibia's Decree on Natural Resources', 2 *Yale Studies in World Public Order* 285-341 (1975-1976), at 311 *et seq.* A defence of the South African position (and a critique of the "dictatorial nature of the decree") can be found in H. Booysen and G.E.J. Stephan, 'Decree No. 1 of the United Nations Council for South West Africa', 1 *South African YIL* 63-86 (1975), esp. at 68 (referring to the dual functions of the UN Council).

<sup>571</sup> Cf. F. Oppenheimer, 'Governments and Authorities in Exile', 36 *AJIL* 568-593 (1942), 586-87.

<sup>572</sup> Cf. Barsotti, 'Amministrazione diretta', *supra* note 316, at 133-4. Against their application Junius, *UN Council*, *supra* note 226, at 56-63 as well as François Rigaux, 'Le Décret sur les Ressources Naturelles de la Namibie adopté le 27 Septembre 1974 par le Conseil des Nations Unies pour la Namibie', 9 *RDDH* 467 (1976), at 471. The policy considerations underpinning the rules governing governments-in-exile were, however, applicable to the Namibia situation. Talmon convincingly argues that if one questioned the representative competence of an exile government for lack of effective control, it would benefit the illegal authority *in situ* and lead to the (at least partial) incapacity of the former to act on behalf of the entity (*Recognition of Governments in International Law. With Particular Reference to Governments in Exile* (Oxford: Clarendon Press, 1998), at 115. Courts which give extraterritorial effect to laws of governments-in-exile usually have to decide two main questions: whether the law in question is constitutionally valid and, if so, whether its recognition and enforcement would be contrary to the public policy of their state. For an in-depth study of the extraterritorial legislative authority of a government-in-exile, including national case law, cf. *id.*, at 233-238 and 245. For an early discussion of the question whether the United Nations, through the Council for Namibia, could obtain physical possession of Namibian products and resources (despite not being in control of the territory) and how it could establish its title cf. Itse Sagay, 'The Right of the United Nations to Bring Actions in Municipal Courts in Order to Claim Title to Namibian (South West African) Products Exported Abroad', 66 *AJIL* 600-604 (1972).

<sup>573</sup> Cf. Bundestags-Drucksache, 10/5312, 14 April 1986, quoted by von Lucius, 'Beschlagnahme Urans', *supra* note 549, at 1951. For a survey of the Belgian, French, German, Japanese, Dutch, British and U.S. American municipal legal system's putative response to the enforcement of Decree No. 1 and particularly the 'public policy' aspect see the Report by the UN Commissioner for Namibia, 'Implementation of Decree No. 1 for the Protection of the Natural Resources of Namibia. Study on the Possibility of Instituting Legal Proceedings in the Domestic Courts of States', UN Doc. A/AC.131/194 (1985), reprinted in 80 *AJIL* 442 (1996).

riconoscimento e l'attuazione, nei rispettivi ordinamenti interni, degli atti esecutivi emanati dall'organo di governo del Territorio.<sup>574</sup>

While the previous observations pertained to the legislative acts of the UN Council for Namibia as a subsidiary organ of the GA, a different conclusion is reached when taking into account the Council's legislative competence within the territory, based upon the General Assembly's entitlement to directly administer Namibia. Taking up this second function of the UN Council as a territorial government in whose capacity the Decree was issued, the Commissioner for Namibia submitted proposals, in July 1980, for the so-called 'Uranium Hearings' which aroused considerable interest in this specific aspect of the exploitation of Namibian natural resources. The Panel's conclusions, subsequently approved by the Council and the UN General Assembly, emphasised the normative importance of the Decree in the territorial dimension:

Decree No. 1, the first major legislative act of the United Nations Council for Namibia, is a domestic law of Namibia... Removal of uranium from Namibia in contravention of Decree No. 1, in addition to being a violation of the domestic law of Namibia, has the additional effect that persons or entities which remove uranium in this way have no legal title to any Namibian uranium which may be in their possession.<sup>575</sup>

While its normative range was doubted by individual member states (and its enforcement depended on the attitudes of national courts to this *sui generis* legal instrument), Decree No. 1 formed part of the body of law of Namibia, promulgated by the only authority which could lawfully legislate in that territory. As positive law of Namibia with *Gestaltungswirkung*, it would presumably be retroactively effective once an independent state of Namibia had emerged.<sup>576</sup> Indeed, the retroactive effect of these instruments might have shown its strongest normative force when the new government of Namibia was able to claim damages, based on §6 of the Decree, from persons and companies which violated its terms.<sup>577</sup> Regardless of the obstacles that Decree No. 1 faced in municipal courts, and their varying recalcitrance in applying foreign public acts,<sup>578</sup> the deeper impact of a creative construction to activate international law in support of a territory unable to govern itself can hardly be overstated. In the process, the UN had created a body that exercised two functions and legislated with *sui generis* instruments. In accordance with the relevant decisions of the GA, the powers of the UN Council concerning the territory were exercised *on behalf* of the entity. This lends plausibility to our earlier assertion that the legislative acts of the UN Council were acts of an agent through which the legal person of a non-state territorial entity acted.

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<sup>574</sup> Barsotti, 'Amministrazione diretta', *supra* note 316, at 76 (my emphasis).

<sup>575</sup> GAOR (XXXV), Suppl. No. 24 (UN. Doc. A/35/24), vol. III, approved by A/RES/35/227, 3 March 1981.

<sup>576</sup> Junius, *UN Council*, *supra* note 226, at 153. Cf. the GA's continued pronouncements on the illegality of foreign economic activities within the territory that would incur liability "to the future legitimate Government of an independent Namibia" (A/RES/42/14, *supra* note 326, section A, §69).

<sup>577</sup> See Schrijver, 'Urenco', *supra* note 314, at 41.

<sup>578</sup> Cf. *id.*, at 43 *et seq.*

RÉSUMÉ: *WELTINNENPOLITIK* AND THE TEMPORARY IDENTITY OF DOMESTIC AND FOREIGN POLICY

The present chapter highlighted two aspects that advance the investigation of the legal proprieties of an international administering authority. Firstly, we analysed the dual nature of the body that administers and represents a non-state territorial entity. The reasoning employed by the ICJ in its first Opinion on the *International Status of South-West Africa*, in 1950, offered a first glimpse into the two sets of interests a fiduciary administrator has to pursue, when it stated that "[t]he Mandate was created in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object – a sacred trust of civilisation".<sup>579</sup> Secondly, we emphasised that – flowing from the agent-organ's dual identity – an international administration's legislative acts were capable of mobilising an increased normative content when they were targeted towards the specific local environment in which the organ was competent to legislate.

In its wider significance, 'dual functionality' – which we observed in the cases of Germany under Allied occupation and Namibia under temporary UN administration – is not a theory but a central analytical device to separate the functions, and two-tiered set of responsibilities of a temporary international administration. The preceding discussion drew our attention to the key actor in an internationalised territory and directed us to disaggregate the intersecting influences that converge around this 'bicephalous' body in its agency and organic functions, facing simultaneously 'outward' to the international community as its organ and 'inward' towards a domestic audience which depends on the agent to perform the fiduciary bond. Examining an international administration from a dual functionality angle has a distinct advantage over unidirectional explanations that conceive it as solely responding to a territorial need, hence dismissing the constraints imposed by the organic relationship in which the international agent is embedded. The frame applied here to exemplify the UN Council for Namibia's dual identity gives equal conceptual weight to both organic structure and agency and hence to each of the two functions an international territorial administration fulfils. It allows us to comprehend that in *its quality as situated territorial agent* an international mission is constrained in its articulation by the operation of a fiduciary bond between it and the ones it governs. In *its corollary identity as a subsidiary organ* of the United Nations, an international administration is constrained in its 'domestic' strategic choices by international law and the politics of its mother organisation.

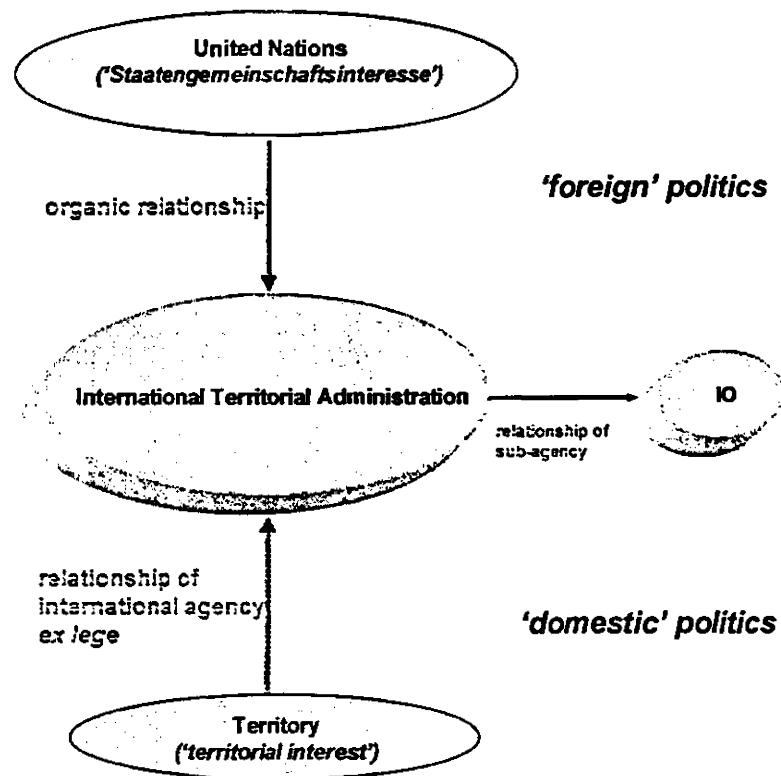
The incidence of dual functionality is not only capable of refining our analysis of the distinct sets of international legal obligations a fiduciary administration is bound by. It also allows us to make tentative statements which touch upon the field of international relations theory. By way of concluding our discussion of the construction of limited personality of a temporarily internationalised territory and the dual functions of an agent governing it, we shall take note of the curious convergence of domestic and foreign policy that we were able to witness in the operation of the Council for Namibia. As we demonstrated, this international agent was situated at the exact interface between domestic and international politics and law. The UN Council for Namibia's 'foreign policy' represented Namibian politics to the same extent as its 'internal' policies – designed to alleviate pressures on the Namibian people – were performative of the public international legal interest. In case of convergence of the performance of territorial and international community interests, we encounter doubts as to whether the

<sup>579</sup> ICJ Reports 1950, *supra* note 173, at 132.



'external acts' of the agent/organ – its 'foreign policy' – are indeed 'boundary producing' political performances that *Campbell* suggests to be central to the production and reproduction of a territory's 'identity'.<sup>580</sup>

These observations are to a certain extent capable of generalisation beyond the context of the Council for Namibia. Our investigation into the properties of an internationalised territory is enhanced by the imminent realisation that, once UN *imperium* is established,<sup>581</sup> the domestic legal order which the UN promulgates for a transition period is part of the UN legal system, but with reference to a specific territory.<sup>582</sup> In such a situation, the international agent administering an international territory is the nexus between the fields of domestic and foreign policy; the conceptual duality between the international and the domestic has collapsed into agency. The graphic below identifies the position of international territorial administration as the nexus between the territory and the wider community interest.



By applying *Scelle's doctrine of dédoublement fonctionnel* to the political arena, we can account for an international administration's simultaneous pursuit of *meta-national* values

<sup>580</sup> Cf. David Campbell, *Writing Security: United States Foreign Policy and the Politics of Identity* (Minneapolis, MN: University of Minnesota Press, (1992) 1998), at 68.

<sup>581</sup> What of course distinguishes the UN Council for Namibia from UNMIK is, apart from a different mode of conception, mandate and dissimilar organic relationship with its mother organisation, the latter's assertion of effective control over territory.

<sup>582</sup> Cf. Ruffert, 'Administration', *supra* note 144, at 623. The import and domestication of international law into the municipal context of an internationalised territory and the specific properties of such temporary normative order will be discussed in Chapter VI.2.1, *infra* p.215.

(international community interest) on the one hand and those value schemes connected with safeguarding the 'territorial' interests on the other.<sup>583</sup> The dual functions of an international administration hence relate to the *performance* of both the organic and the agency relationship – each of which is tied to the pursuit of a distinct set of 'interests'. If, then, we understand foreign policy as the matrix of representations of subjectivity available at a particular place,<sup>584</sup> we can cautiously approach the phenomenon of international administration as an instance in which the need to discipline and contain the contingency of the 'domestic' realm – at the centre of the realist paradigm – is, *per definitionem*, fulfilled.

Internationalisation of territory, in this liberal rendering, represents the mechanism that temporarily transcends the 'container concept' of states, and with it the boundaries between domestic and foreign politics and the corresponding territorial opposition of 'interior' and 'exterior'.<sup>585</sup> The modalities through which, for instance, the yearly budget of an internationalised territory (such as Kosovo) is passed – both as local law through the representative Assembly and as a UN Regulation, to whose formulation the IMF and the World Bank substantially and directly contribute – reveals the utter absence of 'boundaries' which would serve to differentiate domestic and international spheres of practice.<sup>586</sup> Territorial internationalisation represents, in Keohane's terminology, an arrangement in which domestic decision-making by the inter-national administration becomes 'institutionally enmeshed' with international legal norms.<sup>587</sup> As a corollary, it is through international agency that the expression and representation of the composite entity's interests takes place. Arguably, this administrative regime gives rise to a spatio-temporal phenomenon of an ideal type of *Welt-innenpolitik* in which 'domestic' politics cannot be analytically separated from 'external' affairs. Perfect internationalisation thus creates the conditions under which the domestic public interest ('territorial interest') is projected against the 'exterior', while permitting simultaneous reflection of the 'international community interest' to the 'interior'.

At first glance, these hypotheses reveal a disturbing inconsistency when contrasted with our earlier conclusions arguing that 'discursive patterns' and representational practices of an international administration construct international legal personality and produce boundaries between the 'international' and 'domestic' spheres. An attempt to accommodate this paradox would suggest that while the dichotomy between domestic and foreign policy appears to be temporarily suspended as an international agent/organ projects community interest onto the

<sup>583</sup> For a critique of Scelle's doctrine as unable to distinguish between these two sets of interests see Cassese, 'Scelle's Theory', *supra* note 502, at 219.

<sup>584</sup> Cf. Mark Laffey, 'Locating Identity: Performativity, Foreign Policy and State Action', 26 *Review of International Studies* 429 (2000), at 431.

<sup>585</sup> For an account of the realist container scheme and its inside-boundary-outside logic cf. Paul A. Chilton, *Security Metaphors: Cold War Discourse from Containment to Common House* (New York: P. Lang, 1996), at 79-119. For a critique of such approaches and the continuing relevance of boundaries as 'markers of security' see Märta C. Johanson, 'Kosovo: Boundaries and the Liberal Dilemma', 73 *NJIL* 535-549 (2004), at 543.

<sup>586</sup> Cf. Rick Ashley, 'Foreign Policy as Political Performance', 13 *International Studies Notes* 51-54 (1987), at 53.

<sup>587</sup> Institutional enmeshment occurs "when domestic decision making with respect to an international commitment is affected by the institutional arrangement established in the course of making or maintaining the commitment" ('Compliance with International Commitments: Politics within a Framework of Law', 86 *ASIL Proceedings* 176-180 (1992), at 179). A more general discussion of the temporary collapse of the dualist construction in cases of plenary international administration will be undertaken in Chapter VI.2.1, *infra* p.215.

domestic sphere and the territorial interest onto the international plane, ontological effects are still installed by way of those representative practices: the construction of the 'foreign' is made possible by practices that also constitute the 'domestic'.<sup>588</sup>

While these conclusions pertain to an ideal-type international administration, this chapter followed a trajectory that outlined the phenomenon of dual functionality throughout colonialism, trusteeship administration, military occupation and territorial administration on the basis of an international mandate. The notion of the fiduciary bond underpinned all examples which illustrated that the more 'international' the mandate of a territorial administration, the more pronounced its assumption of agency and pursuit of the 'territorial' interest. The tensions resulting from the simultaneous performance, by the same actor, of the functions of territorial agent and international organ will accompany our investigation into the properties of an internationalised territory in the next chapters of this thesis. As we will see in the case of Kosovo, both functions are integral to capturing the nature of an international administration, and both functions impose constraints and supply resources.

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<sup>588</sup> Campbell, *Writing Security*, *supra* note 580, at 62.



## CHAPTER V

### THE EXTENT OF UN AUTHORITY IN KOSOVO AND THE PROBLEM OF AN OPEN-ENDED INSTITUTION-BUILDING MANDATE

This chapter is divided into three parts. The first section investigates the status of internationalised territories in light of earlier conclusions. It places UNMIK's administration of Kosovo within the normative framework that emerged from the dynamic shift from horizontal to vertical assumption of effective control, as presented in the first chapter. Further, it contextualises the specific findings by reviewing major constitutional and policy developments in Kosovo over the past six years. The second section aims to crystallise the findings of Chapters III and IV regarding the dual functions of an international administration and the partial personality of the territory itself, applying them to the case of Kosovo. We conclude that an international organ may indeed be torn between performing the 'interests' of a territory and pursuing the collective interest of the international community.

#### **INTRODUCTION: THE UNITED NATIONS' PARTIAL *IMPERIUM* OVER THE TERRITORY**

Two preliminary comments regarding the particularities of Kosovo's interim international administration are in order. Since June 1999, the status of Kosovo in public international law has been the focus of heated debate among legal scholars. There has been an equally ferocious exchange of letters between UNMIK (as well as its component organisations) and the authorities of the Federal Republic of Yugoslavia (FRY) and the Republic of Serbia, who have on occasion taken issue with an alleged encroachment of the right to exercise effective control (UNMIK) or the claim to titular sovereignty (FRY). Serbian state organs continue to claim that Resolution 1244<sup>589</sup> enshrines their right to carry out certain state functions in what they still view as a Serbian province. Based on this claim (and in active violation of Resolution 1244), FRY and Serbian authorities have maintained parallel structures of government in the Kosovo Serb majority municipalities and enclaves, particularly in the field of health care, education, and justice. After June 1999, some courts in Kosovo were relocated to Serbia proper and to the northern part of Kosovo and continue to function as if UNMIK did not exist.<sup>590</sup> In the field of health care, the Serb Ministry for health has aggressively pressured Kosovo Serbs not to co-operate with UNMIK, e.g., by openly demanding health workers not to follow instructions of Kosovo authorities and withdrawing social benefits from Kosovo Serbs who work with UNMIK. A similar pattern has occurred in education with Belgrade authorities effectively running Serbian language schools in Kosovo.<sup>591</sup>

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<sup>589</sup> S/RES/1244, 10 June 1999.

<sup>590</sup> As the Ombudsperson in Kosovo noted in his recent report, "[j]ust as [decisions and judgments of parallel courts] are not accepted by UNMIK structures, Kosovo courts established by UNMIK are in turn not accepted by the parallel courts and administrative offices, or by the regular courts or administrative offices in Serbia proper" (*Fifth Annual Report (2004-2005)* (Prishtina, 2005), at 20.

<sup>591</sup> Cf. the excellent OSCE Mission in Kosovo Report on *Parallel Structures in Kosovo* (October 2003) as well as *Parallel Security Structures in North Mitrovica* (21 May 2002). References to parallel structures are also made in *Collapse in Kosovo* (ICG Europe Report No. 155, 2004), at 7 *et seq.* When looking at practical aspects of daily life, it might appear surprising that certain Serbian enclaves such as Gračanica, Štrpce and Serbian villages in Gjiilan municipality, as well as Northern Mitrovica and surrounding areas are still using the Serbian postal service and telephone lines that have continued to operate in those areas throughout the armed conflict to this day

When discussing the notion of *imperium*, or effective control, exercised by the United Nations, we therefore deploy terms that abstract from the palimpsest of illegal structures and the overlapping footprints of public authority that continue to exercise influence on the territory. A second caveat may be appropriate. As a case study which draws from the theoretical foundations laid out in the first four chapters, the following discussion only covers the Kosovo's institutional development until mid-2005. This snapshot of a process, along with the criticism advanced against policies that deeply affected the position of an internationalised territory, might, in hindsight, look distorted or incomplete. But at the time of writing, the success or failure of this experiment in international administration was a matter that still lay in the uncertain future.

## 5.1 KOSOVO'S STATUS AND SERBIA'S BARE TITLE TO THE TERRITORY

*'[T]he mandate is the floor (but not the ceiling)  
for everything the Mission does.'*<sup>592</sup>

When considering the establishment of an international territorial administration in the final stages of the air campaign, the United Nations was able to draw on two separate institutional experiences: on the one hand, the Mandate- and Trusteeship systems, and on the other, 'complex peacekeeping' operations. UNMIK's authority was based on a Chapter VII mandate, within the spirit of transferring effective control on a vertical basis, without explicit invitation by the target state. It fell in the category of peacekeeping operations, with the Department of Peace-keeping Operations (DPKO) providing the institutional anchor. On the other hand, UNMIK (much like UNTAET) was set up to operationalise an underlying doctrine of development concerning 'dependent territories' which, exiting from authoritarianism and societal conflict, appeared to be defenceless and voiceless in a world order which had not yet granted them final political status. In interim arrangements, the UN and its subsidiary organs undertook obligations regarding what was once called the "well-being and development of peoples" from a "sacred trust of civilization",<sup>593</sup> while providing the umbilical cord tying such dependent territories to the international community.

The resort to an international territorial administration to promote the existence of an organised territorial government raises difficult questions concerning the residual sovereignty claims of the former holder of ultimate authority over the territory. The answer to the question of who exercises administrative control – or, in the words of Sole Arbitrator *Huber* in the *Island of Palmas* case, the entity that engages in a "continuous and peaceful display of state authority"<sup>594</sup> – is often held to be determinative of who is the titular sovereign.

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(Ombudsperson, *Fifth Report*, *supra* note 590, at 30). For UNMIK's (unimplemented) strategy to combat parallel structures see Michael Steiner, 'A Choice for Mitrovica. The Seven Point Plan' (1 October 2002).

<sup>592</sup> Jacques-Paul Klein, quoted in Simon Chesterman, 'You, The People: Transitional Administrations, State-Building and the United Nations', paper delivered at the Annual Meeting of the International Studies Association (Montreal, 2004), at 7.

<sup>593</sup> ICJ Reports 1950, *supra* note 173, at 131.

<sup>594</sup> *United States v. Netherlands*, 2 RIAA 829 (1928), at 867.

The first chapter of this thesis has examined the relevant body of international law, both state practice and jurisprudence of the Permanent Court and the ICJ, regarding the transfer of administrative capacity. There, we demonstrated that the transfer of administrative prerogatives over territory and the exercise of effective control by a protecting entity are not necessarily preceded by a parallel transfer, or even a corresponding loss, of sovereignty claims. The following exposition wishes to build on this analysis in arguing that claims that a fully internationalised territory such as Kosovo constitutes a 'UN condominium', a territorial extension of 'complex peacekeeping', or even an open-ended "protectorate...not dissimilar from the condition of Class 'A' Mandates of the League of Nations, which were sovereign but not independent"<sup>595</sup>, are all in a certain way mistaken. The view interpreting the UN mandate to build institutions of self-government as a manifestation of an alleged transfer of territorial sovereignty from the Federal Republic of Yugoslavia (FRY, or, in the meantime, the Union of Serbia and Montenegro – SCG) to the UN Security Council may be equally erroneous.

The term 'suspended' sovereignty has been employed in this context to describe constellations in which a multilateral institution, vested with administrative prerogatives, exercises effective control in an internationalised territory. In such circumstances, it is argued that sovereignty is an empty legal proposition, or, alternatively, no longer an applicable legal concept.<sup>596</sup> We suggest that this is not the case. Chapter I demonstrated generally that 'suspending' sovereignty involves the *transitory* inapplicability of a sovereign entitlement in international law. Previous parts of this thesis have addressed this phenomenon that was observed as the notion of 'trust' became operational in the governance of the periphery following the Versailles Treaty. We also suggested that similar processes of 'de-sovereignisation' were at play as the UN Security Council 'vertically imposed' UN *imperium* on East Timor with Resolution 1272 (1999). Kosovo, however, presents a markedly different case. The present chapter illustrates that the concept of residual sovereignty, and the pertaining sovereign rights, may well survive their premature obituaries.

### 5.1.1 RESOLUTION 1244 AND ITS FIRST IMPLEMENTING REGULATIONS

In the aftermath of NATO's successful air campaign against the FRY which resulted in a rapid (albeit not immediate) withdrawal of military and administrative personnel from Kosovo, the UN Security Council addressed Kosovo's legal status in UN Security Council Resolution 1244 on 10 June 1999. The Resolution establishes the framework and responsibilities of the interim international administration, which continues to exercise supreme executive and administrative authority. As one author notes, the Serbian government had, from the inception of UNMIK, understood that its *dominium* had been suspended and reduced to a *nudum jus*:

Formally, Kosovo will be a *corpus separatum* within the territorial framework of Serbia, but in fact it will be a separate state without certain external signs of statehood... In this way the

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<sup>595</sup> A.J.R. Groom and Paul Taylor, 'The United Nations System and the Kosovo Crisis', in Schnabel/Thakur (eds.), *Kosovo*, *supra* note 155, at, at 303.

<sup>596</sup> Yannis, 'Suspended Sovereignty' *supra* note 38, at 1038. For a similarly problematic conclusion (namely, that "sovereignty is not suspended; it simply does not exist anymore"), see Barbara Delcourt, 'International Administration of Foreign Territories and Sovereignty: Some Preliminary Reflections', Paper delivered at the SGIR 5<sup>th</sup> Pan-European Conference (The Hague, September 2004), at 12.

fiction of Serbian territorial integrity is maintained... A high degree of autonomy for Kosovo could only mean autonomy within the state of Serbia, and not autonomy for itself, independent of Serbia's state prerogatives. Otherwise there would be separate statehood for Kosovo. But under the veil of the UN, NATO has in fact created the State of Kosovo.<sup>597</sup>

Resolution 1244 vested the SRSG and UNMIK with "[a]ll legislative and executive authority ..., including the administration of the judiciary" over the territory and people of Kosovo, and the power to issue "legislative acts in the form of regulations" as necessary.<sup>598</sup> Such Regulations would "remain in force until repealed by UNMIK or superseded by such rules as are subsequently issued by the institutions established under a political settlement".<sup>599</sup> The Resolution's first implementing Regulation listed a series of main responsibilities which effectively self-institutionalised all powers that would normally be attributed to a state government. Moreover, the Secretary-General conferred the final authority of interpretation of the Resolution, and hence of UNMIK's mandate as such, upon his Special Representative, a power which had previously never been stated expressly.<sup>600</sup>

A deeper analysis of the operation of law in a transitional setting occurs in the next chapter. Meanwhile, we can, at the outset of this discussion, submit that in the case of Kosovo, a territorial legal system was established stemming from an international legal source.<sup>601</sup> Since summer 1999, an international territorial administration has adopted norms with direct and immediate effects (i.e., norms which have normative content directly binding upon persons under UNMIK's jurisdiction, regardless of whether they correspond to a higher source of law such as the basic norm of Resolution 1244 or international human rights treaties), without requiring domestic incorporation. The rules set by international authority in internationalised territories are, by definition, part of the UN legal system, but refer to a specific territory.<sup>602</sup>

<sup>597</sup> Interview with Ratko Marković, Deputy Prime Minister of Serbia, in Kosovo and Yugoslavia: Law in Crisis, debate forum on [www.jurist.law.edu](http://www.jurist.law.edu), quoted by Marcus Brand, *Kosovo under International Administration: Statehood, Constitutionalism and Human Rights* (dissertation on file with the University of Vienna, 2002), at 82.

<sup>598</sup> UNMIK/REG/1999/1 *On the Authority of the Interim Administration in Kosovo* (25 July 1999), §1.1 and s.4. The self-authorisation of the administration contained in the first regulation was equally comprehensive in the case of UNTAET whose first Regulation stipulated that "[a]ll legislative and executive authority with respect to East Timor, including the administration of the judiciary, is vested in UNTAET and is exercised by the Transitional Administrator" (UNTAET/REG/1999/1 *On the Authority of the Transitional Administration in East Timor*, s.1.1). For a strong critique see Outi Korhonen, 'International Governance in Post-Conflict Situations', 14 *LJIL* 495-529 (2001), at 499.

<sup>599</sup> UNMIK/REG/1999/1, s.4.

<sup>600</sup> *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo* (12 July 1999), S/1999/779, §44. See also UNMIK/REG/2001/19 *On the Executive Branch of the Provisional Institutions of Self-Government in Kosovo* (13 September 2001) which stipulates that the SRSG "shall have the final authority to interpret the scope and any other parameters of the executive responsibilities of the Provisional Institutions of Self-Government set out in the present regulation" (s.19). As Sarooshi points out, this power of interpretation is necessary for the effective exercise by the SG of powers delegated to him. Once his reports to the SC are adopted, the SG will often use the report to provide evidence that the Council supports his particular interpretation of the way in which delegated powers are to be used – which is precisely what happened in the case of his Report of 12 July 1999. This means that the SG exercises a power of authoritative interpretation over his delegated powers ('Role of the SG', *supra* note 514, at 286-87).

<sup>601</sup> Cf. Michael E. S. and Thilo Marauhn, 'UN Administration of Kosovo and East Timor: Concept, Legality and Limitations of Security Council-Mandated Trusteeship Administration', in *Kosovo and the International Community. A Legal Analysis* 217-242 (ed. by C. Tomuschat, The Hague: Kluwer Law, 2002), at 228.

<sup>602</sup> Cf. Ruffert, 'Administration', *supra* note 144, at 623-624.



These rules may be complementary to, and interlaced with, municipal legal provisions that have not been superseded by UN legislation.<sup>603</sup> The direct applicability of UNMIK legislation is justified when interpreting Resolution 1244 as a legal instrument that 'opened' the legal order of the FRY, but not because of the 'approval' of the FRY expressed its Annex 1,<sup>604</sup> but solely by way of its basis in Chapter VII of the UN Charter. Its grounding in Chapter VII enabled Resolution 1244 to derogate FRY's legal order.<sup>605</sup>

#### (i) UNMIK'S DEPLOYMENT STRATEGY AND 'PILLAR' STRUCTURE

SRSG Hækkerup envisaged UNMIK's deployment strategy in four integrated phases. In the first phase, the mission would set up administrative structures, deploy an international civilian police and provide emergency assistance to returning refugees. Throughout the second phase, the focus would be on the administration of social services and utilities and the consolidation of the rule of law. In the third phase, UNMIK would conduct elections for a Kosovo Assembly and finalise preparations for the creation of provisional institutions of self-government while promoting the establishment of 'substantial autonomy' of Kosovo. The concluding phase would concern a final settlement of the territory's status.<sup>606</sup>

Following Resolution 1244 and its first implementing Regulations, a plenary system of territorial administration has emerged.<sup>607</sup> As the surrogate state,<sup>608</sup> UNMIK remains composed of a structure of 'pillars', each reporting to the SRSG. Divided into four major components, the structure reflects the heavy dependence of the operation on the efforts and resources of various states and international organisations. While one pillar remained with the UN, namely the one concerned with the interim civil administration, the other pillars were distributed to UNHCR for humanitarian affairs, to the OSCE for institution building, and to the EU for economic reconstruction.<sup>609</sup>

More specifically, the UNHCR was put in charge of preparing the winterisation and humanitarian aid programme in the framework of Pillar I; Pillar II/UN was given the responsibility of

<sup>603</sup> Some of the problems surrounding the subsidiary applicability of FRY and Serbian municipal status will be discussed in Chapter VI.2.1 (i), *infra* p.213.

<sup>604</sup> As argued by Carsten Stahn, 'The United Nations Transitional Administrations in Kosovo and East Timor: A First Analysis', 5 *Max Planck UNY* 105-138 (2001), at 146. Elsewhere, Zimmermann and Stahn suggest, equally problematically, that by agreeing to Resolution 1244 and its Annexes, the FRY "ceded its administrative authority over the territory to the United Nations" ('Yugoslav Territory', *supra* note 153, at 443). This interpretation is open to the critique that FRY's consent was void since its conclusion was procured by the use of force (Cf. Milano, 'Action', *supra* note 138).

<sup>605</sup> This re-states the conclusions of Chapter I.2.2, *supra* p. 41

<sup>606</sup> Cf. Ismije Berishie, Bernhard Knoll, et al., 'OSCE Mission in Kosovo – Two Years into Institution Building' in International Organisations in Kosovo: Finding the Path through the Maze, 4 *Favorita Papers* (Diplomatic Academy Vienna, 2001).

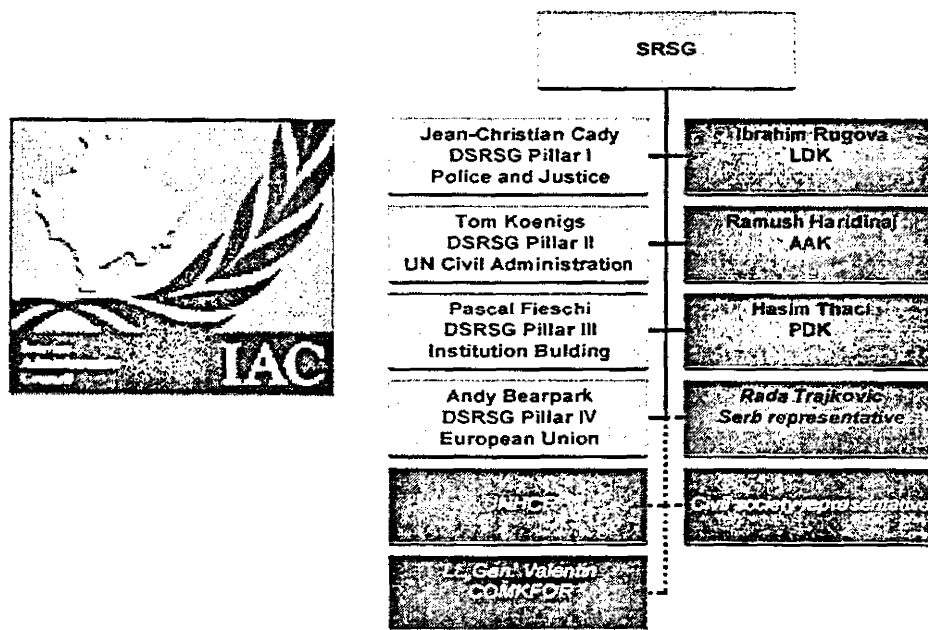
<sup>607</sup> For a concise study on the constitutional history of Kosovo and the recent attempts to build political institutions cf. Carsten Stahn, 'Constitution without a State? Kosovo under the United Nations Constitutional Framework for Self-Government', 14 *LJIL* 531-561 (2001).

<sup>608</sup> This expression was used by the Kosovo Ombudsperson Institution in a study on the *Compatibility with Recognized International Standards of UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo* (18 August 2000), and on the *Implementation of the Above Regulation*, Special Report No. 1, (26 April 2001), at 8.

<sup>609</sup> See *Report of the Secretary-General* (12 July 1999), *supra* note 600, §§54-109. The OSCE Mission in Kosovo was mandated by OSCE Permanent Council Decision No. 305, 237<sup>th</sup> Plenary Meeting (PC.DEC/3050, 1 July 1999).

the civil administration and the management of public affairs (in particular, to revive health, education, and other public services); Pillar III/OSCE was given the portfolio of democratisation and institution building (including the promotion of independent media, the organisation of elections, the training of a local police force, and a human rights monitoring brief); and Pillar IV/EU was put in charge of coordinating the economic reconstruction of key infrastructure and other economic and social systems such as the development of a market-based economy, the co-ordination of international financial assistance, and the resolution of trade, currency and banking matters. After UNHCR had left the Pillar structure in June 2000, a new Pillar I responsible for Law Enforcement and Justice was created in spring 2001. It was charged with ensuring the integration and coordination of functions that would under different circumstances be carried out by Ministries of Justice and Interior and includes the Kosovo Police Force, the local judiciary, and the local corrections service.

The structure below illustrates the composition of the Interim Administrative Council (IAC) that operated as part of the Joint Interim Administration Structure (JIAS) between January 2000 until the adoption of the Constitutional Framework in May 2001 and the holding of the first general elections later that year.<sup>610</sup> Represented in the IAC – the embryonic government tasked with recommending to the SRSG amendments to the applicable law and the setting of policy guidelines for the administrative departments – were the entire Pillar Structure, headed by the respective deputy SRSGs, and their local political counterparts in what will later be termed 'dual-key' governance setting.



<sup>610</sup> For the competencies of the IAC see s.3 of UNMIK/REG/2000/1 *On the Kosovo Joint Interim Administrative Structure* (14 January 2000). The emerging institutions created under the JIAS agreement of 15 December 1999 are authoritatively discussed by Brand, *International Administration*, supra note 597, at 87 et seq. See also Michaela Salamun, *Democratic Governance in International Territorial Administration* (Dissertation on file with the University of Graz, 2004), at 117-120.

It is not our intention to assess the success of this integrated 'pillar structure' or its impact compared to the different institutional set-up in Bosnia and Herzegovina. It suffices to note that the purpose underlying the establishment of an 'integrated' international administration consisted in the creation of unity of purpose, the exploitation of synergies and the avoidance of duplication. From its inception, different 'institutional cultures' and dissimilar approaches to phenomena of normative change have, however, hampered pillar-wide policy formation and implementation. At times, the incomplete integration of bureaucracies has also bred suspicion among international actors. As a recent internal assessment conducted by the UN remarks, the pillar structure created frustration over the lack of visibility for the accessory organisations while it also enabled them to 'hide' behind the UN "without developing their own strategies within their areas of responsibilities".<sup>611</sup>

UNMIK-wide strategies and the formulation of inter-pillar priorities had only seriously began in the summer of 2002 with the drafting of a set of 'benchmarks' against which progress in several key areas of institution-building was to be measured – an optimal internal management tool that was employed in a strategically erroneous fashion.<sup>612</sup> Equally, inter-pillar co-operation and co-ordination has been weak with joint strategic and operational planning being the exception rather than the rule. Apart from numerous duplications of mandates and efforts (the issue of minority returns<sup>613</sup> as well as resolving property disputes<sup>614</sup> primarily spring to mind), resurfacing discussions on 'restructuring' UNMIK and 'aligning' its component organisations has absorbed much energy. By taking attention away from the substance of the international mission's work, this has undoubtedly slowed down the projected timeline for the hand-over of competencies to local institutions.

Interestingly, the military aspects of the operation – what would normally be viewed as the more classical peacekeeping duties – fall entirely outside of UNMIK's mandate. Military aspects are instead the direct responsibility of the Kosovo Force (KFOR), whose Commander (ComKFOR) reports to NATO and whose Secretary General answers directly to the UN Security Council. KFOR is, as *Zwanenburg* correctly observes, a subsidiary organ of the North Atlantic Council. It exercises control through the Supreme Allied Commander Europe (SACEUR), who delegated his command to the Commander in Chief Allied Forces Southern Europe (CINCSOUTH).<sup>615</sup> KFOR contingents are grouped into five Multinational Brigades which, although falling under the unified command and control of ComKFOR,<sup>616</sup>

<sup>611</sup> 'The Situation in Kosovo. Report to the Secretary General of the United Nations. Summary and Recommendations', undertaken pursuant to the UNSG Report of 30 April 2004 (S/2004/348), henceforth referred to as the 'Eide Report', Brussels, 15 July 2004, at 23. The frictions resulting from UNMIK's multipillar structure are criticized in Ruth Wedgwood and Harold J. Jacobson, 'Symposium: State Reconstruction After Civil Conflict – Foreword', 95 *AJIL* 1-6 (2001), at 2-3.

<sup>612</sup> For a critique of the 'standards's approach, cf. Chapter V.1.2 (ii), *infra* p.163.

<sup>613</sup> Cf. UNHCR, *Critical Appraisal of Response Mechanisms Operating in Kosovo for Minority Returns* (February 2004).

<sup>614</sup> See Leopold von Carlowitz, 'Crossing the Boundary from the International to the Domestic Legal Realm: UNMIK Lawmaking and Property Rights in Kosovo', 10:3 *Global Governance* 307-331 (2004).

<sup>615</sup> *Accountability under International Humanitarian Law for United Nations and North Atlantic Treaty Organization Peace Support Operations* (Ph.D., Leiden University, E.M. Meijers Instituut, 2004), at 48.

<sup>616</sup> S/RES/1244 (1999), Annex II, §4. A special agreement was concluded concerning command and control of Russian troops. The underlying reason for such a complex arrangement is the desire of troop contributing states to preserve as much political responsibility and control over their troops as is compatible with the requirements of military efficiency (cf. the Report of the European

are responsible for specific areas of operation. As opposed to 'full control', 'unified command and control' only encompasses a limited transfer of authority over troops, with the authority affecting the soldier's personal status and disciplinary action being reserved for the commanders of the respective national units. Even though it is generically provided for under UN auspices, national KFOR commanders have been granted substantial room for autonomous action, which appears to be subject only to coordinative efforts undertaken by the SRSG to ensure that the military partner operates "towards the same goals and in a mutually supportive manner".<sup>617</sup> The interim governance framework established by Resolution 1244 and subsequent vertical instruments has thus created an alliance between a UN Mission – a subsidiary organ of the SG – and two regional bodies (OSCE and EU), together with a separate military presence which encompasses a strong contribution from NATO.

Since the adoption of the Constitutional Framework (CF) by UNMIK in 2001,<sup>618</sup> this system of plenary international administration has begun to operate alongside local actors. The document recognises the special internationalised status of Kosovo, arising from a disjunction of sovereignty and exclusive administering authority, or *imperium*. With a view to protecting the civil identity of the new political community, the drafters of the CF defined Kosovo as "an *undivided territory*" under interim international administration and an "entity... which, with its people, has *unique* historical, *legal*, cultural and linguistic *attributes*".<sup>619</sup> The document also acknowledges "Kosovo's historical, legal and constitutional development"<sup>620</sup> while containing no reference to the authority of FRY organs in Kosovo. By determining the institutional structure and the power of Kosovo's political organs, the framework document lays the foundation for the transfer of administrative responsibilities while overseeing and supporting the consolidation of Kosovo's local provisional institutions.<sup>621</sup>

Following the general elections held in autumn 2001, UNMIK has begun to transfer the daily administration of important parts of its responsibilities to the local institutions established by the dual key system of governance under the CF as well as under UNMIK Regulation 2001/19.<sup>622</sup> However, crucial areas such as external relations, law enforcement and justice,

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Commission for Democracy Through Law (Venice Commission), *Opinion on Human Rights in Kosovo: Possible Establishment of Review Mechanisms* (Opinion No. 280/2004, 60<sup>th</sup> Plenary Session (Strasbourg, 11 October 2004), at 4 *et seq.*).

<sup>617</sup> S/RES/1244, at §6. Yannis comments that the '[d]ualism at the top of the command of an international administration...reflects the reluctance of key NATO states to place their military forces under UN command, which inevitably creates an accountability gap in the chain of command' ('Kosovo Under International Administration', 43:2 *Survival* 31-48 (2001), at 32). The relationship between UNMIK and KFOR is succinctly discussed by Diana Rossbacher, *Friedenssicherung – am Beispiel der Interimsverwaltung der Vereinten Nationen im Kosovo (UNMIK)* (Hamburg: Verlag Dr. Kovač, 2004), at 168-171. For a discussion of coordination between UNMIK and KFOR on an operative and tactical level, see also John G. Cockell, 'Civil-Military Responses to Security Challenges in Peace Operations: Ten Lessons from Kosovo', 8 *Global Governance* 483-502 (2002).

<sup>618</sup> UNMIK/REG/2001/9 *On a Constitutional Framework for Self-Government* (15 May 2001). Cf. Bernhard Knoll and Kara Molina-Johnston, 'A Rocky Path: Kosovo's Transition To Provisional Self-government. General Elections in 2001 and Beyond', in OSCE-Yearbook 2002, 8 *Institute for Peace Research and Security Policy* (IFSH-Hamburg University, 2002), at 131 *et seq.*

<sup>619</sup> UNMIK/REG/2001/9, §§1(2) and 1(1), emphasis added.

<sup>620</sup> *Ibid.*, preamble.

<sup>621</sup> S/RES/1244, §11(d).

<sup>622</sup> UNMIK/REG/2001/19, *supra* note 600. The Regulation is of a constitutional character, defining *inter alia* the functions of the Prime Minister and Ministers. It creates the organisational structure

the protection of minority communities, and budgetary control remain under the direct authority of the SRSG. In addition to reserving certain competences, he retains the power to correct any actions of the Provisional Institutions of Self-Government (PISG) that he deems incompatible with Resolution 1244. As a vehicle to begin the transfer of substantial responsibilities from UNMIK to the PISG, the SRSG announced, in 2003, the establishment of a Transfer Council (co-chaired by himself and Kosovo's Prime Minister) to decide upon the method and timetable to implement, coordinate, oversee and review the transfer of an initial list of 44 competencies.<sup>623</sup> An analysis of the dual-key governance framework will be taken up again in Chapters VI. Prior to that, we will re-apply the Roman law frames presented in Chapter I in order to continue our investigation into the status of Kosovo in public international law.

## (II) SOVEREIGNTY V. *IMPERIUM*: APPLYING THE *IN REM* FRAMEWORK

As a policy institution, Kosovo's emerging international territorial administration was charged with taking over administrative functions from the FRY, in the framework of a loosely bound system. Its exercise of *imperium* continues to depend on the coordination and cooperation of a range of military, political, administrative and non-governmental organisations. As already stated, the drafters of Resolution 1244 clearly refrained from recognising Kosovo as an independent state and abstained from making binding determinations with respect to Kosovo's future status in international law. The Resolution merely authorised the UN Secretary General to establish an international civil presence to oversee the "transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement" and tasked UNMIK with facilitating "a political process designed to determine Kosovo's future status".<sup>624</sup> In accordance with widespread legal opinion, UNMIK's mandate under Resolution 1244 to perform basic civilian functions and to maintain law and order while simultaneously developing democratic institutions has, from its inception, meant the complete take-over and exercise of all executive and legislative powers, including the administration of the judiciary over the territory.<sup>625</sup> The developments surrounding the transfer of effective control, and the United Nations' subsequent normative practice of self-authorisation as the holder of *Kompetenz-Kompetenz* in all branches of territorial government, underline the need to reconsider the discourse on the determination of Kosovo's status under public international law.

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of the Ministries and introduces general principles of civil service. The Regulation was revised by UNMIK/REG/2004/50 *On the Establishment of New Ministries and Posts of Deputy Prime Minister and Deputy Ministers in the Executive Branch* (2 December 2004), which marked a transfer of responsibilities to the PISG. Further detail relating to the legal framework of the PISG executive branch can be found in the following documents: UNMIK/REG/2001/36 *On the Kosovo Civil Service* (22 December 2001); UNMIK/REG/2002/5 (4 March 2002) and 2005/15 (16 March 2005), both *Amending UNMIK/REG/2001/19*; UNMIK/DIR/2002/10 *Implementing UNMIK Regulation 2001/19* (31 May 2002).

<sup>623</sup> See UNMIK/PR/930 of 7 March 2003 and an internal O/SRSG Paper, 'Terms of Reference, Tasking and Membership of the Working Groups' (15 April 2003). Parallel to the transfer competencies on central level, the SRSG announced the full devolution of executive responsibilities to the most successful municipalities, and withdrew into a monitoring and oversight function. See UNMIK Internal Discussion Paper, 'Transfer of Responsibilities to the PISG at the Municipal Level' (12 February 2003). On 30 December 2003, the SRSG confirmed that all remaining non-reserved competencies had been transferred to the PISG. Cf. UNMIK European Union Pillar IV, Kosovo Outlook 2004 (Prishtina, 13 May 2004), at 6.

<sup>624</sup> S/RES/1244, §§11(f) and (e), with reference to the Rambouillet accords (S/1999/648). A discussion of the 'open-endedness' of UNMIK's mandate will be undertaken in the next section.

<sup>625</sup> See the *Report of the Secretary-General* (12 July 1999), *supra* note 600, at §35.

The opinion that the FRY has "forfeited its ability to exercise sovereign jurisdiction over Kosovo"<sup>626</sup> under UNMIK's authority seems to have gained considerable currency among scholars. It is based on the understanding that UNMIK, as "the only legitimate authority in Kosovo,"<sup>627</sup> has responsibilities both *vis-à-vis* the population of the territory and what is often termed the 'old sovereign'. Noting that the FRY has been "deprived of its sovereign rights", *Stahn*, for instance, suggests that for a limited period of time, international missions administer a 'sovereign-free' zone.<sup>628</sup> *De Wet* describes the process of internationalisation as the "provisional transfer of sovereignty of the territory to the United Nations...on the basis of the Security Council's implied or customary powers".<sup>629</sup> In an equally radical fashion, *Ringelheim* concluded that the establishment of an international administration amounts to a suspension of the FRY's sovereignty and suggests that sovereignty over Kosovo has been temporarily vested in the UN itself.<sup>630</sup>

These propositions are incompatible with prevailing scholarly opinion that the United Nations cannot have territorial sovereignty.<sup>631</sup> The proposition that the Security Council 'swapped' FRY sovereignty for UN sovereignty<sup>632</sup> is also untenable. As already highlighted in Chapter I, the acquisition and maintenance of sovereign title depends, at least in traditional international law, on the presence of two distinctive elements: actual effective control and the intention to be bearer of the title.<sup>633</sup> While the element of effective control need not necessarily be concrete (as we have previously demonstrated, the exercise of government authority can be vested in another entity while a *nudum jus* remains with the sovereign), the most convincing counter-argument to *Ringelheim* and *de Wet* would recall that the United Nations, as an international territorial administration, lacks the *animus possidendi* upon which a claim to territorial sovereignty must be based. The UN, as an administrative authority, would presumably not harbour proprietary or other similar interests in a 'modern trust' territory.<sup>634</sup>

Resolution 1244, as explained in the following section, tries to reconcile two conflicting

<sup>626</sup> Marcus G. Brand, 'Institution-Building and Human Rights Protection in Kosovo in the Light of UNMIK Legislation', 70 *Nordic JIL* 461-488 (2001), at 463.

<sup>627</sup> *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo* (23 December 1999), UN Doc. S/1999/1250, § 35.

<sup>628</sup> 'Constitution Without a State?', *supra* note 607, at 540-541. This argument is also presented in his 'Transitional Administrations', *supra* note 604, at 119, and his 'Orgins', *supra* note 516, at 135-136.

<sup>629</sup> Erika de Wet, 'The Direct Administration of Territories by the United Nations and its Member States in the Post Cold War Era: Legal Bases and Implications for National Law', 8 *Max Planck UNYB* 291-340 (2004), at 331.

<sup>630</sup> 'Legal Status', *supra* note 63, s.2.2.

<sup>631</sup> Lauterpacht, 'Capacity to Administer', *supra* note 42, at 409-13.

<sup>632</sup> Paul R. Williams, 'Earned Sovereignty: The Road to Resolve the Conflict over Kosovo's Final Status', 31 *Denver JILP* (2004), 387, at 405-406.

<sup>633</sup> Cf. the *Legal Status of Eastern Greenland* case in which the PCIJ held: "A claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority" (*supra* note 51, at 45-6).

<sup>634</sup> For arguments that sovereignty could conceivably reside with the UN if it were to acquire proprietary interests, see Ruth E. Gordon, 'Some Legal Problems with Trusteeship', 28 *Cornell ILJ* 301-347 (1995), at 342-3. The argument does, however, not stand on firm ground. Permanent UN territorial sovereignty seems incompatible with the broader objectives of self-determination which are at the heart of the UN Charter.

objectives: first and foremost, the realisation of meaningful self-government mediated by the fiduciary powers of an international territorial administration; and secondly, the preservation of the FRY's continued *dominium* over the territory. Within the vertical paradigm presented in Chapter I.2.2, the adoption of a Security Council Resolution, based on Chapter VII of the Charter, entailed the suspension of the FRY/SCG's right to exercise residual powers during the period of international territorial administration. It also prevents UNMIK from any act that would render FRY/SCG's sovereign claims meaningless in the long term.<sup>635</sup> In short, behind the thick layers of the UN's legislative, executive and judicial powers over the territory, there lurks the thin veil of the bare title, or *dominium*, of the entity f.k.a. Federal Republic of Yugoslavia.

### (III) CODA: A CASE STUDY

The conclusion that sovereign title is no longer a comprehensible legal concept in situations where international territorial administration assumes effective control is, in the case of Kosovo, erroneous. The following hypothetical case study involves a scenario that synthesises a number of arguments made throughout the first chapter which sought to revitalise the positivist assumptions underlying the instruments used to divorcing title to territory from effective control (*imperium*). The assumptions relating to the first part of the scenario are informed by an ongoing debate regarding the extent and speed with which UNMIK should devolve competencies to local institutions.

1. Following a highly emotional debate in the Kosovo Assembly (elected to its third term of office in September 2006) on the issue of the continued monopolisation of key competences by the UNMIK interim administration which, according to a caucus leader, "continues to impede opportunities for self-determination by the inhabitants of Kosova", and the slow progress made in the Council for the Transfer of Competences, a two-thirds majority of the Assembly members decides to boycott the Provisional Institutions of Self Government (PISG) until "Kosova's final status is resolved in the interest of its people". In a co-signed press release, leaders of the three most eminent Kosovo Albanian political parties declare their dissatisfaction with what they regard as an incomplete and slow transfer of powers, particularly in the fields of external relations, law enforcement and security, to the democratically elected Kosovar institutions, and announce a territory-wide referendum on the independence of Kosovo.
2. The Republic of Serbia is predictably terrified by the prospect of an independent Kosovo, and sees its continued claim to territorial sovereignty, reaffirmed by both

<sup>635</sup> Cf. Tobias H. Irmscher, 'The Legal Framework for the Activities of the United Nations Interim Administration in Kosovo: The Charter, Human Rights, and the Law of Occupation', 44 *GYIL* 353-395 (2001), at 365-6. Recently, it has been suggested that the UN organ administers the property of the former title-holder of sovereign rights over the territory "in the interest and on behalf of the latter" (Zimmermann/Stahn, 'Yugoslav Territory', *supra* note 153, at 443). Another monograph identifies the FRY as 'Treuhänder' (Rossbacher, *UNMIK*, *supra* note 617, at 94). Both views must be unambiguously rejected. In the case under consideration, this would mean that UNMIK acted in the interest of SCG which would not only contradict the mandate contained in SC Resolution 1244(1999) but also the primary objective of an international trust: "Dem Begriff der Treuhand... [ist] der Zweck immanent, die zur treuen Hand übernommenen Befugnisse zum Wohle der Nutznießer, im völkerrechtlichen Kontext also der Bewohner des betroffenen Landes, auszuüben" (Hufnagel, *Friedensoperationen*, *supra* note 104, at 213). This position is also supported by the arguments advanced in Chapter III that expounded upon the agency relationship between an international administration and the territory it represents.

Resolution 1244 and its new republican Constitution (2003),<sup>636</sup> undermined by what it considers to be an ineffective and pro-Albanian international administration. In a petition to the UN, the Union of Serbia and Montenegro (SCG) asks whether sovereignty over the territory of 'Kosovo and Metohija' (Kosmet) 'belongs' to SCG and whether it is entitled to re-establish effective control following a threat to its territorial integrity in the guise of a popular consultation that the subsidiary organ of the UN Secretary-General appears unable to defuse. The second question raised by SCG concerns the intended transfer of its sovereignty title if it is not permitted to re-establish effective control over Kosmet. SCG submits that it would, in this case, enter into preliminary discussions with the government of Albania with the aim of immediately transferring sovereignty over the territory to the latter, notwithstanding UNMIK's continued exercise of effective control and mandate laid down in Resolution 1244.

3. Following an immediate response from the UN Security Council declaring the outcome of a future referendum null and void, 84 percent of Kosovo's eligible population seem to have embraced the referendum – unsupervised as it was by the international community. In an urgently convened meeting, the Contact Group confirms that it will not recognise any moves to unilaterally establish political arrangements for the whole or part of Kosovo.
4. Rejecting the call from the SCG government to end international involvement in Kosovo, UNMIK affirms that it continues to implement Resolution 1244 by building local institutions until a political solution to the territory's final status will be agreed upon. In the same vein, UNMIK dismisses SCG's intention to engage with Albania in preliminary talks on the cession of sovereignty over Kosovo in what it calls an "irresponsible and cynical ploy". In a written reply UNMIK's Legal Adviser asserts that the transfer of sovereign rights was "inconceivable since Kosovo was placed under an international administration which limits SCG's ability of disposition in accordance with the principle of *nemo plus iuris (ad alium) transferre potest, quam ipse habet*.

In this purely hypothetical case, we detect a number of features that render the notion of an internationalised territory more concrete and embedded in the context of international norms that continue to govern the *traditio* of effective control over territory. Drawing together the threads laid out in the course of this and the first chapter, one could evaluate the case in the following manner:

1. The claim to sovereign title over the territory of Kosovo has not been ceded, conveyed or transferred to the United Nations by Resolution 1244. UNMIK Regulation 1/1999 merely confers full jurisdiction over Kosovo (*imperium*) to UNMIK. The transfer of *imperium* to an international territorial administration, a subsidiary organ of the UNSG, was based on Chapter VII which prevents SCG exercising competence over the territory (for example with respect to internal boundaries) during UNMIK's presence.<sup>637</sup>

<sup>636</sup> Cf. Reinald Eckhardt, 'Die Verfassungs-Charta der Staatengemeinschaft "Serbien und Montenegro" vom 4. Februar 2003', 49:2 *Osteuropa Recht* 165-177 (2003).

<sup>637</sup> Ruffert, 'Administration', *supra* note 144, at 620. See the case of the FRY-FYRoM border agreement discussed in Chapter VI.1.2, *infra* p. 200. Generally, it should be noted that the SCG's



2. Notwithstanding its administration by a UN Security Council-mandated organ, Kosovo has not ceased to be part of SCG. The latter remains the titular sovereign, her claim having been reduced to a *nudum jus* in the sense that she is obliged to accept important restrictions to the exercise of her sovereign rights over Kosovo. A practical consequence of the sovereign's interest in such a case is her continuing right of disposition, a significant proprietary right. The existence of such residual sovereign title hence includes SCG's ability to carry out an act of disposition, such as the cession of its sovereign rights to Albania. Until she has regained effective control over the territory, SCG is, however, unable to give what matters most, undisturbed possession.<sup>638</sup>
3. SCG can exercise its right to dispose of the territory by virtue of its bare title *qua* titular sovereignty, for the benefit of another state. Albania would hence acquire a title over territory, which is similarly reduced to a *nudum jus*. This situation is comparable to the acquisition of a territory with a servitude or restriction in the interest of another administering entity which has juridical effect *erga omnes* and even binds successor states. Albania must accept the United Nation's *imperium* as a limitation to its exercise of effective control in accordance with Resolution 1244.<sup>639</sup> The transfer of *dominium* would neither affect the status of Kosovo as effectively controlled by UNMIK, nor Kosovo's internal power-sharing agreements with the PISG.
4. Were such transfer is envisaged, the states involved are arguably duty-bound to ascertain the wishes of the population concerned, by means of a referendum, or by any other appropriate means that ensure a free and genuine expression of will.<sup>640</sup>

Departing from the *in rem* perspective presented above, the remainder of this chapter examines some of the pitfalls inherent in an 'open-ended' institution-building operation where

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likely disintegration would not have an impact on the status of Kosovo. The *Agreement on Principles of Relations between Serbia and Montenegro within the Framework of a Union of States* (Belgrade, 14 March 2002) stipulates that "in the event that Montenegro leaves the union of states, the international documents relating to the FRY, especially [SCR] 1244, would relate in their entirety to Serbia as successor".

<sup>638</sup> Cf. Schwarzenberger, *International Law*, vol.II, *supra* note 529, at 173.

<sup>639</sup> Adapted from the *Lighthouses in Crete and Samos* case, in which the PCIJ held that in 1913 the islands of Crete and Samos were under the sovereignty of Turkey, which therefore had the power to grant or renew concessions with regard to the islands. Though autonomous, Crete had not ceased to be part of the Ottoman Empire. Even though the Sultan had to accept restrictions to the exercise of his sovereign rights, "sovereignty had not ceased to belong to him" (*France v. Greece*, PCIJ (Ser. A/B), No. 71 (1937), at 103). Article 103 of the UN Charter is a primary source of obligation for present purposes. It stipulates that in the event of a "conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement", their obligations under the Charter shall prevail.

<sup>640</sup> Cf. Judge Dillard who stated separately in the advisory opinion on *Western Sahara* that "it is for the people to determine the destiny of the territory and not the territory the destiny of the people" (ICJ Reports [1975], *supra* note 369, at 122). Cassese appears in favour of conditioning such cession upon a plebiscite. He argues that "any inter-state agreement that is contrary to the will of the population concerned would fall foul of the principle of self-determination.... [T]he agreement would be in conflict with *jus cogens*" (*Self-Determination*, *supra* note 222, at 190). The contrary view is held by Brownlie: "[A]t present, there is insufficient practice to warrant the view that a transfer is invalid simply because there is no sufficient provision for the expression of opinion by the inhabitants" (*Principles*, 4<sup>th</sup> ed., *supra* note 45, at 170).

the future status of the entity *in statu nascendi* remains undecided.<sup>641</sup> It first analyses the policy of conditionality through which an international mission propels local institutions into assuming ownership over normative change and through which it tries to measure their performance under imported 'standards'.

### 5.1.2 FROM BENCHMARKING TO STATUS?

*'You cannot stage the play Hamlet without having the scene of the ghost. In the same way, every time we meet to discuss Kosovo, there seems to be a ghost hanging around this room, asking us, what is the ultimate destination and how are we going to get there.'*<sup>642</sup>

In the wake of NATO's 77-day military campaign against the FRY, the adoption of Resolution 1244 enshrined a minimalist consensus regarding the position of a non-state territorial entity in international law. One of the tasks of the international territorial administration was, as one author described it, to struggle to preserve the peace while "trying to balance between the Scylla of Kosovo's independence and the Charybdis of Yugoslav's sovereignty".<sup>643</sup> While the sovereignty and territorial integrity of the FRY were reaffirmed, the strong aspirations towards independence voiced by the majority of the population were temporarily kept in check and mollified by UNMIK. As previously demonstrated, the Resolution vested the right to exercise effective control within the territory in a UN subsidiary organ, thus reducing FRY's sovereign rights to a *nudum jus*. For want of more original options of supra-nationally integrated sovereignty for non-state entities, such as a long-term EU trusteeship,<sup>644</sup> the UN strove to defer the definitive investiture of a sovereign. It sought to freeze the dispute by trying to divert attention away from the international status,<sup>645</sup> effectively leaving the territory in limbo between statehood and disempowered neo-trusteeship.

Rather than promoting particular statehood and self-determination claims – as Resolution 1272(1999) did with regard to the future political status of East Timor –, Resolution 1244 and its implementing mission have been concerned with the creation of organised political institutions. Together with the body of law subsequently promulgated by UNMIK, Resolution 1244 laid the groundwork for an outcome that has not yet been agreed upon. The Resolution stopped short of making the more enduring promise at the core of the UN Trusteeship system: that sovereignty, suspended as it was under fiduciary administration, would eventually be reconstructed along the lines of, and vested in, the actor newly established under the UN Charter, 'the peoples'.

<sup>641</sup> Parts of the following section are published in my 'From Benchmarking to Final Status? Kosovo and the Problem of an International Administration's Open-Ended Mandate', 16:4 *EJIL* 1-25 (2005).

<sup>642</sup> Statement of Singapore on the situation in Kosovo, 27 March 2002, UN Doc. S/PV, at 4498.

<sup>643</sup> Alexandros Yannis, 'The UN as Government in Kosovo', 10:1 *Global Governance* 67-81 (2004), at 68. Timothy Garton Ash noted that those objectives combined 'virginity and motherhood' ('Anarchy & Madness', *New York Review of Books*, 10 February 2000, 48-53, at 48).

<sup>644</sup> For the idea of a European trust cf., e.g., Friedhelm Frischenschlager, 'Eine Europäische Perspektive für das Kosovo?', in *Jahrbuch für Internationale Sicherheitspolitik 2004* (ed. by E. Reiter, Verlag E.S. Mittler: Vienna-Berlin-Bonn, 2005), 349-372 and Thomas E. Grant, 'The EU Must Take Over Kosovo', *Wall Street Journal*, 25 August 2004.

<sup>645</sup> Yannis, 'UN as Government', *supra* note 643, at 69.

(I) THE GOVERNANCE CHALLENGE WRAPPED IN A SOVEREIGNTY ENIGMA

In the words of *Wilde*, contemporary international territorial administrations are framed to respond to two problems: the first is a 'sovereignty problem' regarding the identity and status of those local actors exercising effective control. In the second place, an international territorial administration aims to solve the perceived 'governance problem' affecting local actors which are deemed to be either actively opposed to a particular political agenda or unable to govern satisfactorily because of their insufficient anchorage in a democratic tradition.<sup>646</sup> With regard to the international territorial administration in Kosovo, this chapter has so far aimed at exploring the 'sovereignty problem' behind the creation of an international territorial administration, and more specifically, the authority and status of UNMIK as well as its Pillar structure.

More than six years of institution-building *in vacuo* have borne ambiguous consequences. On the one hand, the international community's unwillingness to synthesise the dialectics of sovereignty and self-determination has not kept it from actively interfering with the exercise of sovereignty by suspending the administrative control of Serbia and Montenegro. On the other, continued recalcitrance in addressing the final status of a UN-administered territorial unit has undoubtedly depreciated the UN's political capital.<sup>647</sup> Echoing a widespread sentiment among the population, the former Kosovo PM *Rexhepi* made the criticism that "being ruled 5,000 miles away in New York is simply not working", adding that "with no road maps, or political deadlines, or sense of resolving their unclear international status as a non-state entity, Kosovars are fast losing hope".<sup>648</sup>

To dismiss such propositions as mere political posturing would be perilous. The spectre of West New Guinea – an institution-building exercise conducted by the UN and designed to produce self-government that was aborted with the territory's effective re-integration into Indonesia in 1963<sup>649</sup> – continues to haunt Kosovar actors operating in a political entity caught in the grey area between international personality and a legal *nihil*. What makes the situation in an 'open-ended' institution-building context so fluid is that the international agents of 'neo-trusteeship' lack a meaningful and coherent theory of how to build viable state institutions. They are unable to give credible assurances that a transfer of full effective control will ever take place. This severely circumscribes their capacity to exercise public power. As we shall see, this situation is worsened by the fact that a matrix of norms, rules, and legal practices through which an international mission could navigate the treacherous waters of an 'open-ended' administration mandate such as the one over Kosovo, does not exist.

In what will be remembered as his legacy to the UN-administered territory of Kosovo, a former SRSG, *Michael Steiner*, based the determination of Kosovo's future status in international law on the idea that certain standards need to be achieved. In order to couch

<sup>646</sup> Ralph Wilde, 'From Danzig to East Timor and Beyond: The Role of International Territorial Administration', 95:3 *AJIL* 583-606 (2001), at 599. See also his presentation 'The United Nations as Government: The Tensions of an Ambivalent Role', in 97 *ASIL Proceedings* 212-215 (2003).

<sup>647</sup> The problem of political legitimacy of a UN territorial administration mission is discussed in Chapter VI.1, *infra* p.194.

<sup>648</sup> Helen Smith, 'Angry Kosovars Call on 'Colonial' UN Occupying Force to Leave', *The Observer* (19 October 2003).

<sup>649</sup> Cf. *supra* note 121.

the transfer of competencies from the UNMIK to the nascent PISG in a wider framework of responsible government, the SRSG, in 2001, instituted a policy of 'benchmarking' through which indicators were to be developed in eight areas of governance.<sup>650</sup> As put forth by the SRSG, the rationale behind this approach was that Kosovo can only advance towards a fair and just society once certain minimum preconditions are met. Steiner argued that these standards mirrored those required for Kosovo's potential integration into European structures: "It must be a democratic, safe and respectable Kosovo on the way to Europe."<sup>651</sup>

The roadmap drawn up for Kosovo indicated mile markers but no direction. The policy of 'standards before status' was framed in the context of an idea that has garnered increased academic following under the terms of 'earned sovereignty'.<sup>652</sup> Its operational elements seek to formulate indicators of good governance through which progress of a *polis* is measured; local institutions are then to be shepherded from one mile marker to the next, from the intermediate phase to the discussion of final status:

Rather than forcing the negotiating parties to determine during negotiations whether the sub-state entity may or may not be capable or allowed to exist as an independent state, earned sovereignty allows the parties to make evaluations of the effect of independence on the parent state as well as [the] emerging state's success at meeting certain benchmarks before determining [the] final status.<sup>653</sup>

The benefits of this conditionality policy accrued in the provision of opportunities for the parties to agree on basic requirements that the nascent entity must meet during a transitional phase in order to qualify for such discussion.

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<sup>650</sup> These areas are: the democratic institutions, rule of law, freedom of movement, returns and reintegration, economy, property rights, dialogue with Belgrade, and the Kosovo Protection Corps. See 'UMIK Benchmark Implementation Plan, April 2004', as well as the notes from 'UNMIK's Dubrovnik Retreat Between 21-22 April 2002'. The latest version of the 'Kosovo Standards Implementation Plan' (KSIP) meanwhile comprises 120 pages.

<sup>651</sup> *Address to the UN Security Council by Michael Steiner* (UNMIK Press Release, 30 July 2002). Steiner continued: "I offer this to the Council as an exit strategy which is, in reality, an entry strategy into the European integration process. Since the EU-Western Balkan Summit of 2003 in Thessaloniki, such appeals to the territory's European destiny have been regularly employed as part of the IC's rhetoric machinery in order to exhort civic virtues in the absence of a nation state. Cf., recently, the invocation of 'standards' as the 'admission tickets' for Europe in the Commission's Communication 'A European Future for Kosovo' (20 April 2005) and UNMIK SRSG Jessen-Petersen's speech to the OSCE Permanent Council, Vienna, 10 February 2005.

<sup>652</sup> Generally, see James R. Hooper and Paul R. Williams, 'Earned Sovereignty: The Political Dimension', 31 *Denver JILP* 355 (2004); Michael P. Scharf, 'Earned Sovereignty: Juridical Underpinnings', 31 *Denver JILP* 373 (2004); Karen Heymann, 'Earned Sovereignty for Kashmir: The Legal Methodology to Avoiding a Nuclear Holocaust', 19 *American University ILR* 153 (2003); and Paul R. Williams and Francesca J. Pecci, 'Earned Sovereignty: Bridging the Gap Between Sovereignty and Self-Determination', 40 *Stanford JIL* 347 (2004), and Williams, 'Earned Sovereignty', supra note 632.

<sup>653</sup> Paul R. Williams, Michael P. Scharf and James R. Hooper, 'Resolving Sovereignty-Based Conflicts: The Emerging Approach of Earned Sovereignty', 31 *Denver JILP* 349 (2004), at 438. Cf. also Robert O. Keohane, 'Political Authority after Intervention: Gradations in Sovereignty', in *Humanitarian Intervention. Ethical, Legal, and Political Dilemmas* (ed. by J.L. Holzgrefe and R. Keohane, CUP 2003), at 290. The idea was initially spurred on in the context of the proposal of the 'Goldstone Commission'. Cf. the two reports by the International Commission of Kosovo: First, *The Kosovo Report: Conflict, International Response, Lessons Learned* (2000) and, second, *The Follow-Up Report: Why Conditional Independence?* (2001).

## (II) OF ROADMAPS AND ROADBLOCKS: THE 'EARNED SOVEREIGNTY' APPROACH

As a policy instrument, 'benchmarking' hardly represented a novel tool for aiding the determination of a territory's status. Attempts at the 'standardisation' of the local environment had formed an elaborate practice within the Trusteeship system under which the UN collected full information on whether the administering authority had implemented obligations assumed under the Trusteeship Agreement. Covering issues such as political and economic development, public finance and taxation, human rights and fundamental freedoms, public health and educational advancement, the Trusteeship Council's 'Questionnaire' provided a matrix against which progress of the native population was to be measured.<sup>654</sup> In its modern embodiment, conditionalities requiring states to undertake specific economic and political reforms in exchange for economic aid have been adopted as key policy tools by the World Bank and the IMF.<sup>655</sup> Similarly, UNMIK's development of 'standards' clearly emulates the Brussels Declaration of the Peace Implementation Council (PIC) of 2000, in which specific benchmarks were established to measure the performance of Bosnian institutions.<sup>656</sup>

UNMIK has presented regular baseline reports to the UN Security Council on the implementation of 'benchmarks' since summer 2002. Until 2003, however, the process remained an exercise that lacking local ownership and served more as an internal managerial tool than a policy adopted by the local provisional institutions. Since early 2003, the benchmark process has been reinforced by the Tracking Mechanism for Kosovo, through which the European

<sup>654</sup> Cf. Chowdhuri, *Mandates*, *supra* note 163, at 202-203. The UN machinery employed in the process of decolonisation emulated a process through which the European centre made the provision of international legal rights and capacities contingent on the fulfilment of certain 'standards of civilization'. The 19<sup>th</sup> century hence saw a reinforcement of the boundaries between 'civilized', 'semi-' and 'uncivilized' countries which qualified only for partial membership in the international society. Cf. Gong, *Standard*, *supra* note 223, at 5-6.

<sup>655</sup> There is an extensive literature on lending conditionality in developing economies. See, e.g., Gordon Crawford, *Foreign Aid and Political Reform: A Comparative Analysis of Democracy Assistance and Political Conditionality* (Basingstoke: Palgrave, 2001); Tony Killick, *Aid and the Political Economy of Policy Change* (London: Routledge/ODI, 1998); Olav Stokke, *Aid and Political Conditionality* (London: Frank Cass, 1995); Georg Sorenson (ed.), *Political Conditionality* (London: Frank Cass, 1993). Since the early 1990s, reforms in EU applicant countries have similarly been dictated by 'conditionality', a set of relatively opaque requirements that had to be met if a state were to qualify for membership. The vast literature on this topic cannot be reproduced here. Cf., eg, Heather Grabbe, 'European Union Conditionality and the *Acquis Communautaire*', 23:3 *International Political Science Review* 249-268 (2002). For a discussion on the ways in which 'benchmarking' directly affects governance in candidate countries and gradually changes institutional practices and behavioural standards, see *id.*, 'How Does Europeanization Affect CEE Governance? Conditionality, Diffusion and Diversity', 8:6 *Journal of European Public Policy* 1013-1031 (2001), at 1022. The SAP towards the Western Balkan countries is reviewed by Christian Pippan, 'The Rocky Road to Europe: The EU's Stabilisation and Association Process for the Western Balkans and the Principle of Conditionality', 9 *European Foreign Affairs R* 219-245 (2004), and Bartłomiej Kaminski and Manuel de la Rocha, *Stabilisation and Association Process in the Balkans: Integration Options and their Assessment* (World Bank Policy Research Working Paper 3108, August 2003). For an in-depth comparison of SSAs (specifically those concluded with fYRoM and Croatia) with the Europe Agreements, cf. David Phinnemore, 'Stabilisation and Association Agreements: Europe Agreements for the Western Balkans?', 8 *European Foreign Affairs R* 77-103 (2003). The passive approach taken by the *Proposal for a Council Regulation Establishing an Instrument for Pre-Accession Assistance* (presented by the Commission, COM(2004) 627 final, Brussels, 29 September 2004) is powerfully criticised in European Stability Initiative, *Breaking Out of the Balkan Ghetto: Why IPA Should Be Changed* (Berlin, 1 June 2005).

<sup>656</sup> Cf. *Declaration of the Peace Implementation Council* as well its Annex (Brussels, 24 May 2000) and European Stability Initiative, *Turning Point: The Brussels PIC Declaration and State-Building Agenda for Bosnia and Herzegovina*, 7 June 2000.

Commission tracks the development of, and provides sector-specific recommendations for, different policy areas as part of the Stabilisation and Association Process (SAP) for Serbia and Montenegro.<sup>657</sup> Under the Tracking Mechanism, Kosovo is obliged to gradually bring its legislation and institutions into line with the EU *acquis*, and receives access to the EU market in return.<sup>658</sup> A real turning point came in November 2003, when the US announced a new initiative on behalf of the Contact Group nations, promising a review of Kosovo's status in mid-2005 if a set of specified standards on governance and treatment of ethnic minorities was achieved by that date. The SC-endorsed 'Standards for Kosovo' plan, flowing from the Contact Group initiative, established five joint UNMIK-PISG working groups to plan and coordinate the fulfilment of the standards to be evaluated by UNMIK in quarterly reports to the SC via the SG.

Conditioning final status talks on the fulfilment of a bundle of 'standards' provoked criticism not only from local political leaders, but also from international commentators, who argued that the task of institution building is made more complex in an environment of suspended sovereignty.<sup>659</sup> Strikingly, the policy does not link a particular future territorial status to the fulfilment of such conditions. Rather, it makes the fulfilment of standards a condition for *commencing discussions* over that status. More worryingly, Kosovo's political institutions are asked to meet standards that are not under *their* control but under that of UNMIK and of Serbia. The dismantling of parallel structures that continue to be financed by Belgrade<sup>660</sup> does not fall to the responsibility of local Kosovo actors, but to Serbia.<sup>661</sup> A lack of "progress in resolving practical issues of mutual concern" in the dialogue with Belgrade<sup>662</sup> should not be held against the PISG. Similarly, as discussed below, the privatisation and liquidation of socially owned enterprises remains a 'reserved competence' of UNMIK, without meaningful participation of Kosovo institutions.<sup>663</sup> The same reasoning applies to the reform of the justice system, which is under the authority of UNMIK's Justice/Police component pillar.<sup>664</sup>

The concrete experience of institution building in Kosovo, discussed in the next section, suggests that an approach based on the fulfilment of what were once named 'standards of

<sup>657</sup> The SAP Tracking Mechanism is a technical working group co-chaired by the European Commission, UNMIK and the PISG. *Commission Staff Working Paper, Serbia and Montenegro. Stabilisation and Association Report*, Brussels, SEC(2003). For a more general introduction into the EU's CARDS programme and the SAP process see two papers of the European Commission/DG RELEX, *CARDS Assistance Programme to the Western Balkans: Regional Strategy Paper 2002-2006* and *Federal Republic of Yugoslavia Country Strategy Paper 2002-2006* (Directorate Western Balkans, Brussels 2002). Cf. also Chris Patten, *EU Strategy in the Balkans* (International Crisis Group, 10 July 2001); European Stability Initiative, *Western Balkans 2004. Assistance, Cohesion and the New Boundaries of Europe* (3 November 2002); International Crisis Group, *Thessaloniki and After (III): The EU and Serbia, Montenegro and Kosovo* (Balkans Briefing 20 June 2003); Wim van Meurs and Alexandros Yannis, *The European Union and the Balkans. From Stabilisation Process to Southeastern Enlargement* (Centrum für angewandte Politikforschung, September 2002).

<sup>658</sup> Cf. Andreas Wittkowski, *Next Step for Kosovo's Medium-Term Economic Development* (UNMIK Pillar IV, 31 January 2003), at 3.

<sup>659</sup> On a strategy of 'standards with status' see Janusz Bugajski, et al., *Achieving a Final Status Settlement for Kosovo* (Center for Strategic and International Studies, April 2003), at 6 et seq.

<sup>660</sup> For parallel structures cf. the introduction to this Chapter and notes 590 and 591.

<sup>661</sup> But cf. Standard I.17 of the KSIP, *supra* note 650, at 21.

<sup>662</sup> Standard VII.3 of the KSIP, at 109.

<sup>663</sup> But see Standard V.5 of the KSIP, at 81.

<sup>664</sup> As correctly noted by Dominik Zaum, 'Letter to the Editor', *Financial Times*, 24 March 2004.

civilization' might bear the seed of its own undoing. Policies of conditionality, devised to make the spectre of nominal sovereignty, or independent statehood, disappear from the daily political business, have so far not amounted to the long-term consolidation of gains from 'humanitarian intervention' in the socio-economic stabilisation, and improvement of domestic governance capacity, of Kosovo. In what can be seen as a severe backlash to a conditionality policy directed at an internationalised territory, the *Eide Report*, submitted to the UN Secretary-General in summer 2004, recommended the immediate replacement of the 'standards' strategy for Kosovo with a more 'dynamic' approach.<sup>665</sup> In June 2005, this changed approach led to the appointment of a Special Envoy (Amb. Eide, author of the initial assessment) who was charged with conducting a comprehensive review of the standards and with an assessment of the conditions for the "possible next steps in the process".<sup>666</sup>

## 5.2 UNMIK AS TERRITORIAL AGENT AND UN ORGAN

*'You gave us freedom, but not a future.'*<sup>667</sup>

The objective of the second part of this chapter is to examine certain aspects of the dual-faceted role of the UN in administering territory and the inherent constraints presented by an open-ended mandate. In this undertaking, we draw on the theoretical discussions presented in Chapter IV (on the dual functions of an international administration). A memo to Kosovo's Prime Minister provides a field for the practical application of the conclusions reached in Chapter III. The external representation function of an international administration acting on behalf of a non-state territorial entity as an agent of necessity is addressed, considering recent and little known developments and suggesting that UNMIK's practice supports the argument that internationalised territories possess limited international legal personality. Section 5.2.2 will then examine UNMIK's performance of the 'international public interest' which it pursues as a subsidiary organ of the UN. The example of the privatisation of public assets by UNMIK illustrates the difficulties of balancing these competing interests. The chapter concludes that an international territorial agent's ability to contribute to the resolution of the 'final status' of its 'ward' is severely compromised by the dual functions it is mandated to pursue. It should, as a rule, not attempt to mediate a solution, but continue to represent the territory in good faith.

### 5.2.1 TERRITORIAL AGENCY

Moving beyond the 'standards before status' policy still being pursued in Kosovo, this section analyses the sphere of external representation of a non-self governing territorial entity. Here, an international administration pursues the 'interests' of the people under its mandate which hold an inchoate title to determine their own political status. Notions of representation of a non-state territorial entity are crucial to its constitution as partial subject of international law.

<sup>665</sup> Cf. *infra* note 667.

<sup>666</sup> *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo* (23 May 2005), UN Doc. S/2005/335, at §22.

<sup>667</sup> Kosovo Albanian student, quoted in the *Eide Report*, *supra* note 611, at 4. For the scope of investigation of the DPKO Assessment Mission that produced the report, see OMIK Weekly Report 24/2004 (11-23 June 2004).

Representation does, indeed, supply the background in light of which much of the subsequent discussion will be more readily intelligible. International representation, as discussed in Chapter III, encompasses a situation in which (i) an entity acts on behalf of another on the international level and in which (ii) specific provisions are laid down by international law for the conduct of the former.<sup>668</sup> This entails a split between the immediately acting international person and the entity to which the legal effects of these acts are imputed.<sup>669</sup> When acting within its power, the agent assumes no personal responsibility toward either the 'principal' or third parties;<sup>670</sup> the represented entity itself becomes the party who is directly liable and who is the direct claimant vis-à-vis a third party.<sup>671</sup>

#### (i) UNTAET AND THE TIMOR GAP TREATY

As a starting point for the discussion of Kosovo under international administration, the case of the Timor Gap Treaty is of considerable interest.<sup>672</sup> In 2000, after the Security Council had assumed temporary *imperium* over the territory, its subsidiary organ – the UN Transitional

<sup>668</sup> Chapter III.2 (i), *supra* p.106. Under pain of acting *ultra vires*, an agent representing a non-state territorial entity cannot perform functions or exercise powers other than those provided in the constituent document, nor convert functional means into purposes. For *ultra vires* acts of international organisations see, in general, Elihu Lauterpacht, 'The Legal Effect of Illegal Acts of International Organisations', in *Cambridge Essays in International Law: Essays in Honour of Lord McNair* (Cambridge, 1965), 88 *et seq.*; Toshiya Ueki, 'Responsibility of International Organizations and the International Court of Justice', in *Liber Amicorum Judge Shigeru Oda* (ed. by N. Ando, Kluwer Law: The Hague, 2002), 237-249. A brief discussion of the notion of a 'wrongful act' will be undertaken *infra*, p. 235.

<sup>669</sup> Sereni, 'Agency', *supra* note 427, at 638.

<sup>670</sup> Agency is understood here as the relationship between the territorial agent and an entity that is under its temporary protection. As already explained in Chapter III.2 (i), this usage might differ from the regular application of the concept since agency is normally established between an agent and a 'principal'. In an asymmetric relationship such as that between a mandant and a mandatory, the use of the term 'principal' would be entirely misleading since it suggests that the mandant has the capacity to appoint the agent (and revoke the agency) which is not the case in an international fiduciary bond. It is in that sense that we can speak of 'compulsory agency *ex lege*' and insinuate that agency is assumed on grounds of necessity, vested in the agent by international law. In order to capture the phenomenon of agency of a multilateral peacekeeping mission more succinctly, we shall mention, in passing, that no rule of international law prohibits the agent being granted the power of appointing a sub-agent for the purpose of the agency (Sereni, 'Agency', *supra* note 427, at 653). This constellation accounts for UNMIK's sub-contracting of international organisations such as the OSCE, to fulfil one of the purposes for which agency was established (*Erfüllungsgelhilfe*).

<sup>671</sup> Geiger, *Beschränkung*, *supra* note 156, at 67-68.

<sup>672</sup> Treaty Between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Australia, 11 December 1989, 29 *ILM* (1990), 475. On this subject, see generally David M. Ong, 'The Legal Status of the 1989 Australia-Indonesia Timor Gap Treaty Following the End of Indonesian Rule in East Timor', 31 *NYIL* 67 (2000); Michael S. French-Merrill, 'The Role of the United Nations and Recognition in Sovereignty Determinations: How Australia Breached its International Obligations in Ratifying the Timor Gap Treaty', 8 *Cardozo JICL* 285 (2000); Julie M. Sforza, 'The Timor Gap Dispute: The Validity of the Timor Gap Treaty, Self-Determination, and Decolonisation', 22:2 *Suffolk Transnational LR* 481-528 (1999). The Treaty had earlier formed the substance of the 1995 *East Timor* case, *supra* note 57. In litigation before the ICJ, Portugal had alleged that in negotiating and concluding the 1989 Treaty, and in initiating its performance, Australia had breached *erga omnes* obligations founded in the right to self-determination, and the permanent sovereignty over wealth and natural resources. It asked the Court to find that Australia was infringing Portugal's powers as the administering authority of the territory, and was impeding the fulfilment of Portugal's duties to the East Timorese and to the international community. The validity of the Timor Gap Treaty was also questioned without success in the Australian High Court. See Brian F. Fitzgerald, '*Horta v. Commonwealth*: The Validity of the Timor Gap Treaty and its Domestic Implementation', 44 *ICLQ* 643-649 (1995).



Administration in East Timor (UNTAET) – was charged with re-negotiating the treaty on behalf of the East Timorese people.<sup>673</sup> According to the account of Amb. Galbraith, UNTAET's Head of Political Affairs between 1999 and 2001,

[the] formation of an East Timorese government made it possible for UNTAET to do something the United Nations has never done before: negotiate a bilateral treaty on behalf of a country. At issue were the vast oil and gas resources beneath the Timor Sea between East Timor and Australia [...that] had been administered jointly by Indonesia and Australia, with the two countries splitting the revenues. Australia wanted UNTAET, and then an independent East Timor, to simply step into the shoes of Indonesia. However, both Sergio Vieira de Mello and the East Timorese believed that East Timor had a strong claim to all the oil and gas. The East Timorese asked UNTAET to negotiate a new treaty that would take effect on East Timor's independence. These negotiations proved highly contentious. Australia argued that the United Nation's involvement on behalf of East Timor violated UN neutrality among member states; it complained about the negotiating tactics of the lead negotiator.<sup>674</sup>

Australia had apparently failed to fully appreciate that UNTAET had assumed two functions, one of which involved the agency on behalf of the territory whose territorial integrity it protected as guardian. In this function, UNTAET was mandated to advance and pursue the interests of a future independent state against competing state interests that happened to include, most prominently, the interests of Indonesia and Australia.<sup>675</sup> For our purposes, it is important to note that the administration of an internationalised territory required the establishment of external relations with other subjects of international law. This necessity has been recognised by the UN Secretary General who referred specifically to UNTAET's capacity to "conclude such international agreements with states and international organisations as may be necessary for the carrying out of the functions of UNTAET in East Timor".<sup>676</sup> In light of the conclusions drawn earlier, UNTAET acted as an agent *ex lege* representing East Timorese economic interests on the international plane, thus lending limited international legal personality to the territory.<sup>677</sup> While the agreement itself was not regarded as binding upon the future sovereign state of East Timor without the formal consent of its new government,<sup>678</sup> the interesting aspect here remains that UNTAET clearly asserted its power to act as the territorial government – as the agent *ex lege* through which a non-state territorial entity acted.

UNTAET has made further use of its treaty-making power by concluding grant agreements with the Trust Fund for East Timor (TFET), administered by the World Bank in co-operation with the Asian Development Bank. In this specific case, as *Chopra* reports, the Bank demanded that the agreement be accorded the status of an international treaty between the

<sup>673</sup> Memoranda of Understanding (MOU) between the Government of Australia and the UNTAET, the first adopted on 10 February 2000, the second on 5 July 2001. Cf. the *Report of the Secretary-General on the United Nations Transitional Administration in East Timor* (26 July 2000), UN Doc. S/2000/738, §23.

<sup>674</sup> 'UNTAET', *supra* note 503, at 211.

<sup>675</sup> Morrow/White, 'East Timor', *supra* note 504, at 25.

<sup>676</sup> *Report of the Secretary-General on the Situation in East Timor* (4 October 1999), UN Doc. S/1999/1024, §35.

<sup>677</sup> Cf. the repeated reference to "acting on behalf of East Timor" in the MOU, *supra* note 673.

<sup>678</sup> Cf. David M. Ong, 'The Legal Status of the Timor Gap Treaty Post-UN East Timor Referendum: Is State Succession to Joint Development Mandated by International Law?', *Proceedings of the Australian and New Zealand SIL* 143 (2000), at 152 *et seq.*

International Development Association (IDA) and the SRSG, signing as "head of state, not merely as representative of the UN".<sup>679</sup> It also institutionalised its relationship with foreign states by providing for the establishment of Liaison Offices of foreign governments in East Timor whose function was largely identical to those of diplomatic missions under the 1961 Vienna Convention on Diplomatic Relations.<sup>680</sup>

## (ii) UNMIK'S PERFORMANCE OF AGENCY

Before entering the substantive discussion on UNMIK's RELEX activities, a brief clarification is in order. The issue of agency *ex lege* to act on behalf of a non-state territorial entity must be separated from the wider set of questions whether international treaties that have been or are being concluded by FRY/SCG require implementation by UNMIK. On the issue of succession into international treaty obligations, UNMIK has, upon the advice of the UN Secretariat, followed a case by case assessment. One Adviser suggested that, as UNMIK "is not exercising sovereignty in Kosovo", it may be "appropriate...to take on certain international obligations due to its empowerment under Chapter VII of the UN Charter to exercise certain basic functions". The extent to which international treaty obligations should be assumed should accordingly be determined "in terms of capacity and political sensitivity".<sup>681</sup> This opinion was recently affirmed by UNMIK:

<sup>679</sup> Chopra, 'Kingdom', *supra* note 9, at 30. The IDA – UNTAET Trust Fund for East Timor Grant Agreement was concluded on 21 February 2000. For more background to the Trust Fund see Michael G. Smith and Moreen Dee, *Peacekeeping in East Timor. The Path to Independence* (London: Lynne Rienner, 2003), at 87-88, as well as Rohland/Cliffe, *East Timor Reconstruction*, *supra* note 344, at 13-28. For references to UNTAET – Indonesia agreements concerning trade, the establishment of a border regime and cooperation in legal and human rights matters cf. *Report of the Secretary-General* of 26 July 2000, *supra* note 673, §§8-11. As a former Legal Adviser recalls, UNTAET made use of its external representation competence beyond agreements regulating the receipt of development grants. Arrangements were concluded between UNTAET (on behalf of the East Timor Public/Transitional Administration) and Indonesia on such topics as establishing postal links, the transfer of Indonesian rupiah to Indonesia, and on pension payments to former civil servants of Indonesian military and police. The validity of some arrangements has been extended after independence (Christa Meindersma, 'Application of the Principle of Good Governance by International Organizations in Practice: United Nations Transitional Administrations', in *From Government to Governance. The Growing Impact of Non-State Actors on the International and European Legal System* 145-154 (ed. by Wybo P. Heere, The Hague: TMC Asser Press, 2004), at 150.

<sup>680</sup> This point is made by Stahn in 'Transitional Administrations', *supra* note 604, at 177-78. S.3.1 of UNTAET/REG/2000/31 *On the Establishment of Representative Offices of Foreign Governments in East Timor* (27 September 2000) provided that the Offices shall, *inter alia*, represent and conduct the relations of a foreign government with the Transitional Administration and protect the interests of this government and its nationals in East Timor. For Kosovo, see UNMIK/REG/2000/42 *On the Establishment and Functioning of Liaison Offices in Kosovo* (10 July 2000). Both Missions had liaison offices in neighbouring states: cf. the *Report of the Secretary-General* (3 March 2000), UN Doc. S/2000/177, §19 (for Kosovo) and UN Doc. S/2000/738 (26 July 2000), §12 (for East Timor). For a different view that explicitly denies the legal personality of East Timor (and Kosovo) see Ruffert, 'Administration', *supra* note 144, at 630. He bases his arguments on the absence of an explicit conferral of the right to enter in diplomatic relations upon the local institutions of the internationalised territory and accordingly considers the national Liaison Offices in internationalised territories as special missions to a UN subsidiary organ.

<sup>681</sup> Internal memo by Michel Pelletier, 'Note to Mr. Guéhenno' (4 April 2001), quoted by Brand, *International Administration*, *supra* note 597, at 170. A more profound analysis of this issue is beyond the scope of this chapter. For a discussion of UNMIK's and KFOR's functional succession with regard to FRY's human rights obligations cf. John Cerone, 'Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo', 12 *EJIL* 469-488 (2001), at 474 *et seq.*, as well as Bothel Marauhn, 'UN Administration', *supra* note 601, at 237.

It must be remembered...that the situation in Kosovo under interim administration by UNMIK is *sui generis*. Accordingly, it has been the consistent position of UNMIK that treaties and agreements, to which the State Union of Serbia and Montenegro is a party, are not automatically binding on UNMIK. In each case, a specific determination as to the applicability of the principles and provisions must be made. Where necessary and appropriate, UNMIK may develop arrangements with relevant States and international organisations in order to establish a proper legal basis for achieving objectives of mutual interest.<sup>682</sup>

While there is no consistent practice with regard to the assumption of SCG's obligations arising out of international treaties,<sup>683</sup> UNMIK has followed established international rules regarding agency: acts performed by UNMIK within the limits of its internationally conferred authority bind the entity as *though* they had been performed by the latter. UNMIK has authorised itself to exercise external affairs powers by providing, in the Constitutional Framework, that the SRSG remains exclusively responsible for "concluding agreements with states and international organisations in all matters within the scope of UNSCR 1244(1999)".<sup>684</sup> The realities of external representation in an internationalised territory are, however, slightly more complex than one would be led to believe. On one hand, Memoranda of Understanding and other non-binding instruments falling within the purview of the local institutions' 'transferred' competencies are regularly signed by local officials only, usually with the necessary references to Resolution 1244.<sup>685</sup> External agreements in the 'reserved areas' entered into by the international administration are, however, of a different nature. As acts of agency performed by the international territorial administration, they are *not* attributable to the UN, whose subsidiary organ has signed up to them, but bind the local institutions and will continue to bind them for as long as the UN assumes the competence of sector-based rule-making in specific policy areas (i.e., as long the local legislature has not acquired the competence to negotiate divergent agreements).

Indeed, the UN has followed a practice of signing international treaties with states and international organisations *on behalf* of the local institutions, whose representatives initial the text of the agreement. To the outside world, the duty to perform an internationally binding agreement concluded by the international agent and a third party – such as the Free Trade

<sup>682</sup> Report Submitted by UNMIK Pursuant to Article 2.2 of the Agreement Between UNMIK and the CoE Related to the Framework Convention for the Protection of National Minorities (CoE Doc. ACFC(2005)003, Prishtina, 30 May 2005), at 31. The UNMIK – CoE agreement is discussed *infra*, note 688.

<sup>683</sup> Problems arising from SCG's increased willingness to ratify human rights treaties which are considered to be applicable within the territory of Kosovo will be discussed *infra*, note 883.

<sup>684</sup> Chapter 8, §8(m) of UNMIK/REG/2001/9, *supra* note 618. The Memorandum of Understanding on the Regional Energy Market in South East Europe and its Integration into the European Community Internal Energy Market (Athens, 8 December 2003, Doc. No. 15548/03/bis), signed by the UNMIK D/SRSG ('EU' Pillar IV), is an example of such exclusive representation, by the international agent, of a non-state territorial entity in international affairs. The Energy Community Treaty was eventually initialed in March 2005 by representatives of the European Commission, Southeast European countries and UNMIK after SCG and Bulgaria withdrew their objections. See also the UNMIK – FRY Agreement on the Transfer of Sentenced Persons (4 April 2002) and the UNMIK – Iceland Agreement for the Provision of Civil Aviation Services in Kosovo (29 January 2004).

<sup>685</sup> Cf. e.g., Memorandum d'Intesa between the Prime Minister of Kosovo and the Sindaco of Verona (24 February 2004). For the power-sharing agreement between UNMIK and PISG cf. Chapters V and VIII of the Constitutional Framework, *supra* note 618.

Agreements signed to date<sup>686</sup> – will henceforth fall upon the actor who is constitutionally competent to do so according to the internal power sharing agreement (Constitutional Framework). This practice is intended to encourage a continued commitment to treaties concluded between a third actor and the international agent once the latter has transferred sector-based competencies to the locally constituted institutions.<sup>687</sup>

Two examples from UNMIK's performance of external relations support the argument that the SRSG and his subordinate machinery are conceived not only as a UN subsidiary organ but also as agent of the territory concerned. Firstly, in the field of human rights law, the SRSG for Kosovo has signed an agreement with the Council of Europe (CoE) re-incorporating the Framework Convention of National Minorities into Kosovo's applicable law.<sup>688</sup> The substance of the agreement, signed by the SRSG under the powers vested in him, falls within the 'reserved powers' of the international administration; no PISG representation was deemed necessary for its conclusion. While the preamble of the agreement explicitly states that the agreement "does not make UNMIK a Party to the Framework Conven-

<sup>686</sup> On 29 May 2003, UNMIK submitted a Statement of Intent to the Stability Pact, committing itself to the obligations set out in the *Memorandum of Understanding on Trade Liberalisation and Facilitation* (Brussels, 27 June 2001). Pursuant to this, UNMIK has concluded a number of FTAs and other instruments under the auspices of the respective Stability Pact Working Group. Cf., e.g., the UNMIK (Acting for PISG) – Albania (Ministry of Transport and Telecommunications) *Agreement on Road Transport of Passengers and Goods* (Tirana, 17 June 2002). Further, see the UNMIK (on behalf of the PISG in Kosovo) – Albania (Council of Ministers) *Free Trade Agreement* (7 July 2003) that seek to link the territory into the network of FTAs in South Eastern Europe by foreseeing the immediate liberalization of 50% of traded goods between Kosovo and Albania. Like the *Road Transport Agreement*, it was signed by the SRSG and the Albanian Minister of Economy, and initialed by the responsible Kosovo Minister in charge. In the latter case, the SCG protested to the UN Secretariat (see *Beta News Agency*, 'Sahovic Protested over Steiner's Move' (8 July 2003)). Follow-up measures included the UNMIK – Albania *Agreements on the Avoidance of Double Taxation* (28 September 2004). For the current external trade regime in Kosovo see UNMIK European Union Pillar and Ministry of Trade and Industry, *Trade Policy for Kosovo 2004* (Trade Policy Working Group, 8 April 2004). At present, the network of FTAs negotiated under Stability Pact is not a true Free Trade Area as there are different exemptions and timetables of liberalisation among the participating countries. See Constantine Michalopoulos, *Kosovo's International Trade: Trade Policy, Institutions and Market Access Issues* (Report to the UK DFID, February 2003), at 3. See also the *Agreement on the Field of Plant Protection* and the *Public Veterinary Services Agreement*, concluded between UNMIK and the Government of Albania (by the D/SRSG for Civil Administration and the Albanian Minister for Agriculture and Food, Prishtina, 21 November 2003). For an early agreement concluded by UNMIK on behalf of the territory, cf. *Cooperation Agreement on Cross-Border Economic Issues with FYRoM of 7 March 2000* (UN Doc. S/2000/538, 6 June 2000). This MoU complemented the FTA between the FRY and Macedonia concluded in 1996, which came into operation on 1 January 1999 (which UNMIK deemed applicable in Kosovo). An *Interim Free Trade Agreement* between UNMIK and the Macedonian government was reportedly concluded in June 2005 (See 'Breakthrough on Free Trade Agreement between Kosovo and FYR Macedonia', 29 June 2005, UNMIK/PR/1381).

<sup>687</sup> With regard to the fluid co-governance framework of an institution-building project, the gradual increase in capacity of local institutions implies that their *Verpflichtungs-, Rechts- and Handlungsfähigkeit* in external relations increase as well. With regard to political dependencies see Rauschnig, *Status*, *supra* note 437, at 55-57).

<sup>688</sup> *Agreement between the UNMIK and the CoE on Technical Arrangements Related to the Framework Convention for the Protection of National Minorities*, signed on 23 August 2004. The Council of Ministers authorised the CoE SG to conclude such agreement at its 890<sup>th</sup> Meeting (30 June 2004). Article 3.2(h) of Kosovo's Constitutional Framework had already incorporated the Framework Convention into Kosovo's municipal legal system. As Kosovo is not a party to the ECHR or its additional Protocols, its constitutional 'incorporation' did not remedy the curious situation under which the inhabitants of Kosovo remain effectively deprived of their access to international human rights mechanisms that have recently been accorded to the inhabitants of Serbia proper and Montenegro. Cf. Ombudsperson Institution, *Fourth Annual Report (2003-2004)* (Prishtina, 2004), at 30, as well as the discussion in Chapter VI.2.3, *infra* p. 222.

tion", UNMIK affirms "on behalf of itself and the PISG that their respective responsibilities will be exercised in compliance with the principles contained in the Framework Convention".<sup>689</sup> In what may represent the very first measure ever to tie an international territorial administration into a multilateral accountability framework, UNMIK committed itself to submit full information to the CoE Committee of Ministers on the legislative and other measures taken to give effect to the Framework principles.<sup>690</sup> This lends concrete expression to some of the content of the Constitutional Frameworks' enumeration of human rights instruments, which are supposed to be applicable in the territory of Kosovo.<sup>691</sup>

Consider the second example of the performance of external relations functions by the UNMIK SRSG, in which his office served as legal conduit to channel financial assistance from international institutions to local beneficiaries. The narrative proceeds in three stages. First, the World Bank provided initial grant support to Kosovo through its post-conflict fund and net income. In reaching its decision to endorse the first Transition Support Strategy via the establishment of a trust fund for Kosovo, the Bank's Board of Directors concluded that such an engagement was in the interest of the Bank's member states.<sup>692</sup> With the introduction of expanded post-conflict grants mechanisms in the second stage, the International Development Association (IDA) provided grants to UNMIK, serving as the recipient "for the benefit of Kosovo",<sup>693</sup> "a subsidiary organ of a principal organ...of the UN, which is a public international organisation".<sup>694</sup> The background to this intricate lending

<sup>689</sup> Article 1 of the CoE Agreement. Curiously, UNMIK thereby committed itself to fulfil some of the legal obligations which Serbia and Montenegro (SCG) has undertaken by acceding to the CoE. See the discussion *infra*, note 883, p. 223.

<sup>690</sup> Article 2.2 of the CoE Agreement. The reporting schedule (which remains in force for the duration of UNMIK's mandate) foresees that UNMIK submits reports on a 'periodic basis' and whenever the Committee of Ministers so requests (Article 2.3). UNMIK shall participate, in an observer capacity, in the CoM meetings in which information on compliance with the Framework Convention are considered (Article 2.5). A different monitoring measure is foreseen in the *Agreement between UNMIK and the CoE on Technical Arrangements Related to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (23 August 2004). Under this agreement, the respective CoE Committee will obtain direct access to places where persons are deprived of their liberty by UNMIK (Article 1.2). KFOR has so far refused to permit this Committee unlimited access to the detention centre located at the US KFOR Camp 'Bondsteel' (Ombudsperson, *Fifth Report*, *supra* note 590, at 27).

<sup>691</sup> UNMIK has regrettably outsourced reporting obligations to its OSCE institution-building pillar, which has always struggled to maintain a precarious balance between its existence as an integral part of an international administration and the maintenance of an independent human rights portfolio that includes the monitoring of UNMIK's human rights performance. While 'taking the lead' in reporting on compliance within the Framework Convention, the OSCE Mission's Department for Democratisation incidentally also prepared a 'shadow report' on the same topic (interview with OMIK Democratisation Officer, Prishtina, 26 January 2005).

<sup>692</sup> At that time, in 2000, the FRY – subsequently SCG – had not yet succeeded to the membership of the SFRY in the World Bank. Kosovo was thus not a territory of a 'member country'. See *Kosovo, FRY Transitional Support Strategy 2004* (World Bank SEE Country Unit, 18 March 2004), at 13.

<sup>693</sup> As in the case of East Timor where UNTAET was designated as the recipient of the IDA Trust Fund for East Timor (*supra* note 590), WB assistance to Kosovo took the form of IDA grants to UNMIK since "under the current circumstances, the use of regular resources – either in the form of direct lending to Kosovo or through the FRY – is not feasible" (*Kosovo, FRY Transitional Support Strategy 2002* (World Bank SEE Country Unit, Report No. 24275-KOS, 2 July 2002), at 8).

<sup>694</sup> *Ibid.*, at 9. Those grants were only held permissible under Article V(2c) of the IDA's Articles of Agreement, which allow for the provision of the financing of an international organisation. An IDA report noted that "in the post-conflict context, grants could be made available, in special cases, to territories within member countries that are under UN-administration on an interim basis" (IDA, *Report of the Executive Directors of IDA to the Board of Governors. Additions to IDA Resources: 13<sup>th</sup> Replenishment* (IDA/SecM2002-0488, 25 July 2002), at 28, §85).

mechanism of course lay in the ambiguity surrounding the trustee's powers in relation to public assets – a direct consequence of the uncertainty of the territory's future international status. This has discouraged and continues to discourage private investment and hinders lending from international financial institutions. As the Bank admitted in 2004, "[g]iven the uncertainties, a series of relatively short Transition Support Strategies has guided Bank engagement". While financial support has been fairly substantial, constraints on lending meant that the Bank has not assumed the share of the burden it might have in other situations.<sup>695</sup>

The lack of a comprehensive economic development strategy and vision for the territory has, in this second phase, been aggravated by the absence of procedures to be followed prior to the conclusion of an international financial agreement by the SRSG.<sup>696</sup> The related indeterminacy of Kosovo's equitable share of the former FRY's sovereign debt has equally prevented IFI lending for capital projects.<sup>697</sup> In the third stage beginning in March 2004, access to international finance was included as one of the sub-standards within the Kosovo Standards Implementation Plan's economic sphere.<sup>698</sup> Numerous challenges have, however, hampered progress on the issue, among them (i) the lack of counter-guarantees; (ii) questions surrounding the level of involvement of the PISG in negotiating and implementing international financial agreements and (iii) legal succession of obligations under international financial agreements. As regards the last issue, legal uncertainty over the future status of the territory raised worrying questions concerning the capacity of a UN organ to enter into long-term financial agreements on behalf of local beneficiaries, i.e., beyond the expiry of UNMIK's mandate.

Having been asked to provide loans for the reconstruction of infrastructure, the European Investment Bank (EIB) has insisted on obtaining counter-guarantees that the post-determination sovereign be bound to perform obligations contracted by UNMIK. In a letter to the UNSG, both the President of the European Commission and the President of the EIB requested "confirmation from the UN that...(a) obligations contracted by UNMIK will be binding on any authority that will administer Kosovo after the replacement or termination of UNMIK's mandate; and (b) this authority will unconditionally accept those obligations as continuing obligations of Kosovo...".<sup>699</sup> The EIB's demands are remarkable, as they reveal

<sup>695</sup> Cf. World Bank, 2004, *supra* note 692, at 11. The IMF took a more explicit line: "Resolution of Kosovo's final status would provide the right enabling environment to the extent that political uncertainty may hinder investment and economic activity more generally" (IMF, *Kosovo – Gearing Policies Toward Growth and Development*, 18 November 2004).

<sup>696</sup> Insurance of risk management therefore took the form of bilateral agreements in which UNMIK offered certain fiscal advantages to investors whose interests were guaranteed. See, e.g., U.S.-UNMIK *Agreement for Investment Support for Projects in Kosovo* (Washington, DC, 17 May 2002 and Prishtina, 30 May 2002). Agreements covering public investment and donor contributions included the UNMIK (acting for PISG) – Sweden *Agreement on the General Terms for Development Cooperation* (11 March 2003); the UNMIK – Albania *Agreement on the Reciprocal Promotion and Protection of Investments* (19 February 2004); the UNMIK-UK *Agreement Concerning Financial Contribution by the FCO in Support of the Office on Missing Persons and Forensics* (29 June 2004); the EAR – UNMIK *Financial Agreement on Cards 2004 Annual Action Programme for Kosovo for 51.5 Million Euro* (20 May 2004); and the EC – UNMIK *Contribution Agreement for Combating Fraud and Financial Crime in Kosovo for Euro 2,000,000.00* (25 August 2004).

<sup>697</sup> Samuel Skogstad, et al., *Evaluation of the USAID/Kosovo Economic Reconstruction Project* (USAID, November 2003), at 51.

<sup>698</sup> Standard V.1 (action point 4) of the KSIP, *supra* note 650, at 78.

<sup>699</sup> Letter from Philippe Maystadt and Romano Prodi to UNSG Kofi Annan, D (2004) 340 (Brussels, 20 October 2004, emphasis supplied).

the intricacies underlying a territorial entity's access to IFIs absent a status perspective. While discussions on the appropriate legal mechanism through which local institutions succeed to the liability provisions agreed upon with IFIs are ongoing, it has become clear that granting investment funds for the benefit of projects in Kosovo *depended* on the acceptance by the PISG of responsibility for the repayment of loans duly accepted by UNMIK acting on behalf of the former. It has therefore become routine to insert a 'roll-over' clause in an agreement between UNMIK and international financial institutions. By initialling the agreement, the PISG acknowledge that obligations contracted by UNMIK are undertaken for and on behalf of the PISG which normally excludes liability of the United Nations and UNMIK.<sup>700</sup>

The legal basis for such 'roll-over' had only been created in 2004, five years after the beginning of the institution-building and reconstruction effort.<sup>701</sup> The law on International Financial Agreements now provides that a negotiating delegation shall include three UNMIK representatives and three government appointees. It foresees a four-pronged procedure through which such agreements create obligations for Kosovo.<sup>702</sup> Liability for financial

<sup>700</sup> Article 15 of UNMIK/REG/2004/30 *On the Promulgation of the Law on International Financial Agreements* (9 August 2004) stipulates that "PISG acknowledge the obligations undertaken by UNMIK on their behalf...and undertake to take all measures within their power to ensure the full respect of this agreement". The roll-over clause in Article 15(a) provides that "neither the United Nations nor UNMIK shall bear any responsibility for the performance of such obligations or any liability with regard to the performance or non-performance of such obligations by the PISG or any successor to the PISG". The agreement and the performance of obligations thereunder "are neither guaranteed nor otherwise secured by UNMIK or the UN" (Article 15(b)).

<sup>701</sup> *Id.*, Article 5 provides that "[a]ll obligations occurred...shall be binding upon the PISG. Upon completion of the mandate of UNMIK...information on all outstanding obligations under such agreements to be resolved in line with general principles of International Law, shall be duly brought to the attention of the Security Council". For a discussion of the law, cf. Economic Strategy and Project Identification Group, *Towards a Kosovo Development Plan. The State of the Kosovo Economy and Possible Ways Forward* (Prishtina, August 2004). The principles referred to by the law are not entirely clear. One view suggests that a newly independent Kosovo shall not be automatically bound by obligations incurred by the former administering power. The post-colonial rule of *tabula rasa* could arguably be utilised in analogous application of the 'general rule' codified in Article 16 of the 1978 *Vienna Convention on Succession of States in Respect to Treaties*. On the other hand, the scope of the Convention is expressly limited so to exclude its application "to the effects of a succession of States in respect of international agreements concluded between States and other subjects of international law" (Article 3, UN Doc. CONF.80/31, reproduced in 17 *ILM* (1978), at 1488). It is also questionable whether Kosovo would, should its final status be determined in this manner, qualify as 'newly independent state' as UNMIK is, for all purposes, not a 'predecessor state'. It is suggested to agree with Junius who, in the comparable *problématique* in the context of Namibia's fulfilment of obligations contracted by the UNCFn, concluded that "[d]ie Frage der Bindung des zukünftigen unabhängigen...Namibia an die Verträge, die der Namibiarat vorher abgeschlossen hat, ist damit kein Problem der Staatennachfolge, sondern der selbstverständlichen Bindung des Völkerrechtssubjekts an Verpflichtungen, die das frühere dazu berufene verfassungsmäßige Organ wirksam eingegangen hat" (*UN Council, supra* note 226, at 187-191). The issue of heritability of treaties – raised by the evolution of an entity through various intermediate stages of internal autonomy to full maturity – is, in any case, far from novel. Cf. O'Connell, 'Succession', *supra* note 226. For an overview of international legal sources to resolve (likely) disputes over intergovernmental claims see Peritt, 'Resolving Claims When Countries Disintegrate: The Challenge of Kosovo', 80 *Chicago-Kent LR* 119-184 (2005).

<sup>702</sup> Articles 3.2–3.5 of UNMIK/REG/2004/30, *supra*, stipulate that international financial agreements have to be (1) submitted to the government by the Minister for Finance and Economy, (2) approved in writing by the government, (3) endorsed by the Assembly, and (4) signed by the SRSG for UNMIK. The law also provides the legal basis for the future cooperation between UNMIK and the EBRD, according to the MoU signed on 4 March 2005. At the margins, it should be noted that similar arrangements were envisaged for the internationalisation of Trieste and Jerusalem after WWII. Article 24(2) of the Permanent Statute of the Free Territory (Annex VI of the Treaty of Peace with Italy, *supra* note 113) designated the Governor and a representative of

obligations incurred *before* 1999 is seen to be borne by Serbia and Montenegro (SCG).<sup>703</sup> It can be surmised that an across-the-board resolution of the debts incurred after 1999 and those undertaken under UNMIK Regulation 2004/30 will be part of the final status settlement (to which SCG will be a party).

### (III) TOWARDS A LIMITED LEGAL PERSONALITY? A MEMO TO THE KOSOVA PRIME MINISTER

The previous section highlighted new developments in the performance of external representation of a non-state territorial entity by an international agent. Upon further consideration, it is extraordinary that certain problems encountered in new frameworks of international tutelage precisely mirror those bearing similar circumstances under the League's Mandate system. There, the 'defective' legal title to territory also presented an obstacle to capital investment and was thought to "deter a mandatory from guaranteeing loans or making advances for the development of its mandated territory, unless it could have some tangible security".<sup>704</sup> In a similar fashion, insistence on obtaining counter-guarantees represents a continuation of a practice established under the UN Trusteeship system. When a dependency was a party to loans contracted by international agreement, IBRD regulations required that a separate guarantee agreement be concluded between the Bank and the metropolitan power internationally responsible for the territory. As *Zemanek* noted, the dependency thereby "became, within the scope of the provisions of the agreement, a person of international law, directly responsible for the performance of the agreement".<sup>705</sup>

Is this conclusion equally applicable to non-state territorial entities under the direct administration of the United Nations? When deliberating the position of entities other than states or international organisations, it seems fitting to 'unbundle' the concept of legal personality and further develop it as a spectrum recognising a range of varying statuses and severable entitlements, always contingent upon the degree to which a territorial agent has been mandated to perform them. These were at least the conclusions that we arrived at in Chapter III. Following the precedent of international organisations, we defined personality *in relation to the respective functions* the subject in question fulfils in regarding the needs shared by international society. The *capacité juridique* of the entity is thus delineated by a principle of functional limitation. Its legal personality may increase or decrease in accordance with the expansion or compression of functional areas where the international agent performs acts of representation.<sup>706</sup>

The gradual assumption of obligations by Kosovo's local institutions, encouraged by the international administration, indeed suggests that such a territorial entity gradually acquires a

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the Government as competent to jointly sign treaties and agreements, exequaturs and consular commissions (which would also have been subject to ratification by the Legislative Assembly). As with Trieste, the Governor of Jerusalem would have had the power to sign treaties and international undertakings which would have had to be submitted for ratification to the Legislative Council (Article 37(5) and (6), Statute for the City of Jerusalem, *supra* note 107).

<sup>703</sup> Conversation with EC RELEX official, 22 October 2004.

<sup>704</sup> This opinion was voiced in the third session of the Permanent Mandates Commission (July-August 1923), quoted by Evans, 'Termination', *supra* note 242, at 736.

<sup>705</sup> Zemanek, 'State Succession', *supra* note 442, at 259.

<sup>706</sup> As noted earlier, certain colonies and mandated areas that enjoyed limited capacity at one point have subsequently acquired the unlimited international legal personality which flows from statehood (Cf. the discussion in Chapter III.2.1, *supra* p. 108).



limited subjectivity in order to comply with the evolving requirements of international life. The initial latent subjectivity of the territory – addressed by norms of international law circumscribing its content<sup>707</sup> – is activated *qua* 'performance' by UNMIK projecting both its duties and rights to the international plane. As a direct consequence of this complex interaction of the relevant normative behaviour performed through a relationship of agency, Kosovo temporarily manifests its specific spatio-temporal identity by entering into relationships with other international legal persons.

As we have concluded in Chapter III, this functionalist interpretation uses international legal personality as an intermediary, rather than a barrier, allowing the international legal structure to reach "all the way down to the individual inside the collective".<sup>708</sup> As a corollary, Kosovo can accede to the international legal order without mediation by a constraining sovereign. On the international plane, states henceforth con-ceded to collaborate reciprocally with Kosovo through the medium of the international agent whose acts are attributed to the entity.

The following memorandum provides, in 10 points, a field of practical application for the manifold conclusions we reached in Chapters II and III regarding an international agent's 'performance' of a territory's emerging partial legal personality. Abstracting from the 'final status' issue, it also synthesises some of the earlier arguments regarding the spheres of agency and trusteeship in which an international administration's obligations can be situated.

#### MEMO

**To:** Bajram Kosumi, Prime Minister of Kosova  
**From:** Bernhard Knoll, EUI, Florence  
**Re:** Multilateral strategy to expand Kosovo's subjectivity in international law pending a final status solution  
**Date:** June 2005

#### Introduction

1. Membership occupies an important place in the constitutional law and practice of international organisations for many reasons. Most importantly, it is the means by which an international legal person acquires the right to participate, on an equal footing with other persons, in the proceedings of an international organisation.
2. Subjectivity, on the other hand, is a key concept of international law through which a territorial entity may access the international legal plane. Subjectivity – or personality – is regularly awarded by the international community through the process recognising a territorial entity as a sovereign

<sup>707</sup> As explained above, the machinery devised by S/RES/1244 provides for a progressive conferral of broad governmental responsibilities "under which the population can enjoy substantial autonomy" within the FRY and in which the establishment of self-governing institution should ensure the conditions for a peaceful life. As Tomuschat suggests, the notion of 'self-government' has taken on a *legal meaning* which denotes a collective entitlement to a higher level of self-responsibility in the exercise of public affairs, inside a larger political system ('Damaged Sovereignty', *supra* note 141).

<sup>708</sup> Nijman, *Personality*, *supra* note 474, at 120.

state. In turn, personality is widely seen as precondition for membership of international organisations. The status of a territory under an interim UN administration is such that its personality is subject to certain limitations flowing from the mandate of the UN organ responsible for its administration. Subjectivity is arguably 'performed' by the international agent who provides the umbilical cord linking the 'protected territory' to the international normative sphere.

3. UNMIK represents the territory vis-à-vis the outside world, having assumed 'agency of necessity' in external relations. Recent examples of such performance include the bilateral trade agreements between UNMIK and FYRoM and Albania respectively which the former concluded *on behalf of* the PISG. Similarly, UNMIK 'represented' the territory in international relations in its recent application for a SWIFT code as well as in bilateral agreements with international financial institutions (e.g., EBRD) and the Stability Pact for South-Eastern Europe. By carrying out the external relations of Kosovo, UNMIK creates rights and obligations for Kosovo's PISG.

#### I. Objective

4. From the standpoint of public international law, a territory temporarily placed under UN administration is positioned within the grey zone between international personality and a legal *nihil*. The inclusion of Kosovo in multilateral arrangements would enhance the entity's international legal capacity which would, in turn, be difficult to abrogate in the future.
5. In order to expand Kosovo's capacity for external representation and to ensure genuine participation of PISG in international public life, your Office should launch an initiative targeting specialised international organisations. Your government should pursue an aggressive strategy that seeks to prod UNMIK to apply, on behalf of the PISG, for membership of the ILO, WHO, UNESCO and UNICEF. Labour standards, health policy, the preservation of cultural heritage, and policies related to children/youth all fall within the competencies of the PISG.
6. The precedent of Namibia (below) suggests that territories temporarily administered by the UN possess the capacity to apply for membership of international organisations. The two-fold challenge for your Office consists in, firstly, adjusting the international legal reasoning that guided the successful application of Namibia (undertaken by the UN Council for Namibia in the 1970s), and then applying it to the case of Kosovo under UN administration. While the position of Kosovo in international law differs in numerous respects from that of Namibia, your Office must focus on the parallels between those two non-state territorial entities and develop an international legal strategy for future communications with the Legal Offices of ILO, WHO, UNESCO and UNICEF.

#### II. Background: the Namibia precedent

7. In 1966, the UN General Assembly terminated South Africa's Mandate over Namibia that it had acquired from the League and declared its presence in Namibia illegal. South Africa, which did not accept the termination of the Mandate, responded by declaring its intention not to withdraw from the territory. In order to confront the problem, the GA established an eleven-member United Nations Council for Namibia, based in New York. The Council was charged with the task of 'remotely' administering the territory until independence, with the complementary legislative authority to "promulgate such laws, decrees and administrative regulation as are necessary for the administration of the Territory until a legislative assembly is established following elections conducted on the basis of universal adult suffrage."
8. Although the UN Council could not directly administer the territory, it did carry out some of the normal functions of an administering authority. Through the UN Fund for Namibia, the Council helped Namibian refugees, organised training programmes and established an emergency program of economic and technical assistance. In its representative and administrative functions, the

Council also exercised its competence to issue travel and identity documents. In a *note verbale* on 12 December 1968 addressed to the Permanent Representatives of the UN Member States, the SG requested them to accept as valid the travel and identity documents issued by the Council to Namibians abroad. In various exchanges of letters between the UN Commissioner for Namibia and government representatives, the recognition of travel documents issued by the Council was finalised. The Council also opened liaison offices in various East African countries.

9. From its inception, the Council was faced with the problem that it had to operate as a kind of government-in-exile. One of the more successful activities of the UN Council for Namibia consisted in its quest to represent the territory on the international plane, hence seeking membership in various UN specialised agencies. The hurdles on the way to international representation of a non-state territorial entity by a subsidiary organ of the General Assembly were obvious: membership in such bodies is regularly accorded to 'States', 'countries' or 'nations'. Like Kosovo under UNMIK administration, Namibia under the administration of its UN Council certainly did not possess the positive attributes of a 'state', 'country' or 'nation'.
10. Because of its international status, Namibia was, however, treated as a *sui generis* entity for the purpose of being admitted to full membership of international organisations. UN organisations indeed admitted Namibia, represented by the UN Council, into *associated* (WHO, ILO) and even *full* membership (UNESCO), despite provisions under which non-independent territories could only be admitted as Associate Members, and even though the UN Council lacked the administrative structures and capacity of a state.

### III. Recommendations

Your Office may want to consider the development of two strategies to further Kosovo's status in international law.

#### 1. Strategy in partnership with UNMIK

In the first stage, the issue of multilateral inclusion must be raised with the SRSG who will refer the case to the Office of the Legal Adviser. In this process, it will be important to emphasise that a UN organ has, in the past, successfully applied for membership of international organisations on behalf of a territory under its temporary administration. Secondly, your Office will have to prepare a line of reasoning that refutes possible claims that these activities could be in breach of UNSCR 1244 (1999).

- a. Temporary military occupation does not necessarily supply arguments for rejecting Kosovo's membership. The cases of Japan and Germany are instructive as they illustrate instances in which the respective military authorities (the Representative of the Supreme Commander for the Allied Powers on the one hand, and the Allied High Commission for Germany on the other), in 1951, declared that the government is "fully competent to assume and carry out the obligations of membership in the ILO" (ILC, 34<sup>th</sup> Session (1951), 508-509 and 505-506).
- b. The reasoning to be adopted by your Office could include the argument that Kosovo's representation in international organisations by UNMIK (*agency*) stems from certain obligations it assumed with respect to the territory under its protection. Those are of fiduciary nature (*trust*). Kosovo's membership of UN specialised agencies is an indispensable element in fulfilling the international community's responsibilities towards the people of Kosovo. The UN General Assembly adopted a similar reasoning when requesting specialised UN agencies to admit the non-state territorial entity of Namibia.
- c. In particular, your Office could argue that the gradual inclusion of Kosovo in international public life by no means pre-empts final status negotiations. Rather, its accession to specialised organisations would effectively facilitate the realisation of the objectives of SCR 1244 and contribute to

the implementation of the 'Standards' through an increased PISG commitment to incorporate best international practices (UNICEF, ILO).

- d. Resistance to this line of argument can certainly be expected from Belgrade and UNHQ's Office of Legal Affairs. It will be critical for your Office to devise a communication strategy directed at lobbying UN specialised agencies (some of which have offices/advisers in Prishtina).

## 2. PISG back-up strategy

It will be crucial to devise a back-up strategy if UNMIK refuses, for whatever reason, to sponsor the first application bid. In this case, your Office should directly apply to the General Secretary/Secretariat of an international organisation.

- a. It is suggested that your Office begins by selecting an international organisation with the lowest 'barrier' to membership of non-state territorial entities (UNESCO) or an organisation whose decision-making body includes non-governmental representatives (cf., e.g., Art. 1(4) of the ILO Constitution which vests the International Labour Conference (ILC) with the power to admit new members and stipulates a two-third majority requirement that, according to the principle of tripartism, includes the votes of the employers' and workers' delegates). The first successful application resulting in Kosovo's associated membership creates a precedent with much relevance to the next bids.
- b. Other applications can be simultaneously pursued at a later stage. In selecting organisations, your Office should seek out those which specialise in areas falling within the transferred competencies of the PISG (e.g., labour standards or health and youth policy, as opposed to security or justice). This is of the utmost importance as it emerges from the established practice of, e.g., the ILO that a 'state' (for the purposes of membership) means an entity which possesses the status necessary to enable it to *discharge the obligations involved in membership* (for this reason, the application of the Free City of Danzig for membership in the ILO was rejected, in 1930, by both the ILC and the PCIJ).

By internationalising the territory, the Security Council had initially endowed a non-state territorial entity with an agent who is, at the same time, an *organ* of the organised international community – a subsidiary organ of the UN that fulfils functions ancillary to those of the mother organisation.<sup>709</sup> The subsequent section seeks to draw the contrast with the present analysis, where representation of 'domestic' interest took the form of territorial agency. Turning 'inwards', the sphere of domestic administration proves to be an ample field for studying the inherently contradictory sets of interests that a territorial agent/international organ is mandated to pursue.

### **5.2.2 UNMIK AS ADMINISTRATOR OF AN INTERNATIONAL TRUST**

UNMIK is mandated, on one hand, to restructure Kosovo's public economy. On the other, it is prevented from infringing upon the territorial integrity of the FRY/Serbia and Montenegro (SCG). The lack of a 'road-map' for the territory has undoubtedly caused these two mandates to directly collide in the sphere of privatisation, given that the UN's legal advisers have

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<sup>709</sup> Cf. the discussion of the organic framework within which a UN mission is situated, in Chapter IV.1.2, *supra* p. 126.

effectively interpreted Resolution 1244 as prohibiting UNMIK from making any lasting changes to the ownership status of socially owned enterprises (SOEs) which may prejudice the rights of former owners or claimants.<sup>710</sup> The issues at stake emerged as the international community began to engage in state-building without the perspective of statehood. They highlight the gap between an international dual mandate, through which UNMIK pursues the territory's economic interest, while desperately trying to balance it against the wider international public interest that includes SCG's reversionary sovereign title to the territory. This has caused the European Union Pillar of UNMIK to fall behind the ambitious performance benchmarks established by the World Bank.<sup>711</sup> Not surprisingly, an IMF forecast published in 2002 concluded that 'Kosovo's long-term economic prospects are clouded by considerable uncertainty...domestic and especially foreign private investors are unlikely to undertake major projects...as long as uncertainty about the province's future status persists.'<sup>712</sup>

(i) PRIVATISATION, OR: TO BE OR NOT TO BE IMMUNE?

The issues underlying Kosovo's privatisation disaster strike at the heart of the international community's inability to effectively delineate the legitimate scope of an international administration and the extent to which it should exercise political authority in the field of corporate governance. The capacity to transfer property rights and allocate land and assets had been determined with the creation of the Kosovo Trust Agency (KTA, vested with the right to initiate privatisation through spin-offs)<sup>713</sup> and the adoption of a law which allows for long-term leases of socially owned land and determines the recipients of the privatisation process.<sup>714</sup> However, the underlying key problem that caused the privatisation process to

<sup>710</sup> For a study on the nature of the Yugoslav brand of self-management socialism cf. Janez Šmidovnik, 'Disfunctions of the System of Self-Management in the Economy, in Local Territorial Communities and in Public Administration', in *Yugoslavia in Turmoil: After Self-Management?* (ed. by J. Simmie and J. Dekleva, London/New York: Pinter Publishers, 1991), at 17-32. For an examination of the different strategies employed by UNMIK between 2000 and 2002 to fulfil its mandate as trustee of social property see European Stability Initiative, *The Ottoman Dilemma. Power and Property Relations under the United Nations Mission in Kosovo* (Prishtina, 8 August 2002).

<sup>711</sup> World Bank, 2002, *supra* note 693, Annex VI.

<sup>712</sup> Dimitri G. Demekas, *et al.*, *Kosovo: Institutions and Policies for Economic Growth* (International Monetary Fund, 2002), at 14. For a financial risk assessment see also The World Bank, *Kosovo Economic Memorandum* (Report No. 28023-KOS, 17 May 2004), at 10. Cf. also the *Report of the Secretary General on the United Nations Interim Administration Mission in Kosovo* (26 January 2004), UN Doc. S/2004/71, §35.

<sup>713</sup> See UNMIK/REG/2002/12 *On the Establishment of the Kosovo Trust Agency* (13 June 2002). S.8 stipulates the powers of the KTA to establish subsidiary corporations of SOEs. The spin-off model involves the setting up of a subsidiary company using SOE assets, and the subsequent selling off the shares of these subsidiaries. The new company would thus find new investors while the old company would be liquidated. The proceeds are to be deposited into trust accounts to satisfy liabilities remaining with the SOEs, including ownership claims. For interim analyses of the privatisation process cf. Institute for Development Research (Riinvest), *Socially Owned Enterprises and Their Privatisation* (Research Report, 20 June 2002), at 24 *et seq.* as well as Demekas, *Growth*, *supra* note 712, at 19. The passing of the KTA Regulation was preceded by a standoff between SRSG Steiner and the UN's legal advisers in New York who consistently argued that the permanent change – understood as *transformation* – of property rights – would exceed UNMIK's mandate and scope of authority laid down in UNMIK/REG/1999/1, *supra* note 598, whose s.6 merely authorises UNMIK to *administer* immovable property of the FRY/Serbia which is in the territory of Kosovo. Interview with UNMIK Legal Officer, The Office of the Legal Adviser, Prishtina, 3 February 2005.

<sup>714</sup> UNMIK/REG/2003/13 *On the Transformation of the Right of Use to Socially-Owned Immovable Property* (9 May 2003). Cf. also Angela Rapp, 'Gesellschaftliches Eigentum und Privatisierung. Die KTA – eine Treuhandanstalt für den Kosovo', 51:5 *Vereinte Nationen* 167-171 (2003) and

stagnate has yet to be addressed. It relates to the ways by which the UN attempted to limit UNMIK's risk of liability for claims by owners and creditors. It did so by establishing the KTA as an "independent body" with "full juridical personality and in particular the capacity...to sue and be sued *in its own name*".<sup>715</sup>

The underlying controversy was triggered by different conceptions of UNMIK's fiduciary obligations. UNHQ in New York favoured a restrictive view, prioritising the international administration's responsibilities towards the SOE owners (hence initially rejecting the privatisation of their assets). According to this view, the privatisation of public assets represents a case of *détournement de pouvoir*, in that UNMIK took administrative action which, though not excluded in its mandate laid down in Resolution 1244, may be inconsistent with, or outside the scope of, the objectives of the organisation.<sup>716</sup> UNMIK's European Union component, on the other hand, conceived its trustee obligations as primarily directed toward the territory's economic recovery and the creation of a functioning property system.<sup>717</sup> In the eyes of the EU Pillar, this includes the competence to restructure economic institutions through rearranging property interests.

Due to the legal distance that had been created between UNMIK and the KTA, international officials – particularly those serving on the KTA's management board – have raised

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Manuel Eising and Philipp Reszat, 'Die internationale Notstandsverwaltung im Kosovo', 49:1 *Osteuropa Recht* 1-24 (2003), at 22.

<sup>715</sup> UNMIK/REG/2002/12, *supra* note 713, s.1. The subsequent UNMIK/REG/2002/13 *On the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters* (13 June 2002) offers a legal remedy for potential owners and creditors to receive compensation for the loss of property. The passing of this Regulation was seen as *sine qua non* to protect the UN against damaging liability claims in courts outside of Kosovo.

<sup>716</sup> The view that UNMIK's mandate does not extend to the compulsory transfer of property interests (as necessarily occurs when assets are leased to investors for 99 years through the privatisation process) is mainly based on the limitations imposed by the international law of occupation. Cf. the interesting discussion by Irmischer ('Framework', *supra* note 635, at 383-395), who claims that the law of occupation applies to UNMIK, although second in rank after the authorisations in Resolution 1244. Disappointingly though, he does not commit himself on the issue of whether Article 55 of the 1907 Hague Regulations ("it must safeguard the capital of these properties") is actually applicable to UNMIK (which would certainly prevent the privatisation of socially owned property). For two reasons, the answer to this question must be in the negative. Firstly, it is doubtful whether the legal reasoning underpinning the minimum standards incorporated in the Regulations is generally applicable to a UN organ temporarily administering territory. Presumably, these protective functions are already built into its fiduciary mandate. In short, Kosovo is certainly not a territory "placed under the authority of a *hostile army*" (Art. 42). In the case in question, an international territorial administration has been specifically charged with the reconstruction of key economic infrastructure (S/RES/1244, §11(g)). Secondly, drawing a general analogy with belligerent occupation fails to appreciate the particular situation of an open-ended mandate in which the pre-existing sovereign (and arguably the holder of titular sovereignty *qua nudum jus*) may return intact, should the status of the territory be determined in this direction. It would therefore appear that a SC Resolution under Chapter VII can override existing obligations under international humanitarian law, including the law of occupation (Zwanenburg, *Accountability*, *supra* note 615, at 151-152, discussing SC Res. 1483 (2003) that arguably set aside Art. 43 of the Hague Regulations by authorizing the CPA to make important changes to Iraqi governing structures). It is suggested to agree with Perritt who convincingly argues that "the Security Council has, since the issuance of Resolution 1244, exercised continuous oversight over the U.N.'s administration of Kosovo, receiving notice of UNMIK regulations and also receiving regular reports..., some of which have expressly referred to privatization of socially owned assets as a priority... Failure by the [SC] to take action to limit the exercise of this authority by UNMIK evidences concurrence..." ('Resolving Claims', *supra* note 701, at 172).

<sup>717</sup> Cf. Dana Eyre and Andreas Wittkowski, *The Political Economy of Consolidating Kosovo: Property Rights, Political Conflict and Stability* (Bonn: Friedrich Ebert Stiftung, 2002), at 9-11.

concerns as to their personal liability in future litigation regarding their involvement in the privatisation process.<sup>718</sup> As attempts to distance UNMIK and the SRSG's deputies from possible liability claims reverberated through communications between UNHQ, UNMIK and its component Pillar responsible for economic reconstruction, the latter tried to obtain immunity for KTA personnel from the UN. The UN, however, maintained that EU-seconded KTA directors and international members of the KTA board who are not UN staff members did not enjoy the privileges accorded to the UN under the 1946 *Convention on the Privileges and Immunities of the United Nations* (CPIUN).<sup>719</sup> As a consequence, those international board members are exposed to the risk of being personally sued before courts outside the territory and being held liable for actions undertaken in the course of their official functions.<sup>720</sup>

In what can be termed the Battle of the Legal Advisers, UNMIK's Pillar IV insisted that the two key international staff vested with executive authority – the Deputy of the Deputy SRSG for Economic Reconstruction and KTA's Managing Director – would indeed be covered by the aforementioned UN Convention which grants immunities to the category of 'experts on missions' performing functions on behalf of the UN (and who are not UN officials)<sup>721</sup> – an argument that was firmly grounded in the ICJ's interpretation of the Convention.<sup>722</sup> This legal opinion has also been supported by two ancillary arguments relating to the international administration's plural identity. Firstly, the international civil presence, headed by the SRSG, remains responsible in the final instance for supporting the reconstruction of key economic infrastructure.<sup>723</sup> Secondly, the KTA, including its Board, was established by the SRSG by virtue of an UNMIK Regulation in the pursuit of a key UNMIK responsibility. Consequently, any action undertaken by international KTA staff with executive authority (which is *intra vires* with regard to UNMIK regulations and subsequent legislation promulgated by the SRSG) represents an action performed on behalf of the UN and hence attributable to it.<sup>724</sup> This organic link is also supported by the fact that the key KTA managers are appointed by the

<sup>718</sup> Skogstad, *Reconstruction*, *supra* note 697, at 54.

<sup>719</sup> A/RES/22A(1), UN Doc A/43/Ann.I, 13 February 1946, 1 UNTS 15 (corrigendum in 90 UNTS 327). See UN Code Cable 3154 (13 November 2003).

<sup>720</sup> The case of *Wood Industries LLC v. United Nations, UNMIK, and the Kosovo Trust Agency* ([2003], Supreme Court of the State of New York, Index No. 03/602741) appears to demonstrate that the risk of being sued is considerable (Wood Industries withdrew the complaint and re-filed the case in the Special Chamber of the Kosovo Supreme Court where it is now pending the decision to dismiss. The case is also discussed by Henry H. Perritt 'Providing Judicial Review for Decisions by Political Trustees', 15 *Duke JCIL* 1-74 (2004), at 16-17). Due to the financial risks involved, professional indemnity insurances for KTA Board members are not available on the private insurance market (interview with Pillar IV Legal Officer, 1 February 2005).

<sup>721</sup> Article VI, s.22, CPIUN, *supra* note 719.

<sup>722</sup> As pointed out in the *Mazilu* case, this category encompasses a wide variety of persons to whom the UN "has had occasion to entrust missions" (i.e. assignments), as long as they are neither representatives to nor officials of the organisation (*Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the UN*, Advisory Opinion, ICJ Reports [1989], at 20). For a discussion of the term 'official' used both in the Charter and in the CPIUN see Paul C. Szasz and Thordis Ingadottir, 'The UN and the ICC: The Immunity of the UN and Its Officials', 14 *LJIL* 867-885 (2001), at 869-873.

<sup>723</sup> §11(g) of S/RES/1244 (1999). Although the European Union provides financial and technical assistance within the UNMIK structure, such assisting operations are undertaken under the overall responsibility of the UN.

<sup>724</sup> By characterising the KTA as 'independent body' rather than as a 'corporation', UNMIK arguably manifested an intent to classify the KTA's functions as governmental rather than commercial (Perritt, 'Judicial Review', *supra* note 720, at n 79).

SRSB as members of the KTA Board and also by the continuing authority of the SRSB who may repeal or modify all Board decisions.<sup>725</sup> In the latest stage of the legal controversy, UNMIK's Legal Adviser recommended that the UN not grant 'experts on mission' status to non-UN officials, thereby following a restrictive interpretation that effectively excludes those officials from immunity.<sup>726</sup>

As a result of this standoff, the KTA Board has not been officially convened in the period between March 2004 to the end of May 2005.<sup>727</sup> The suspension of the privatisation process is best described by the German term *Kindesweglegung*, a situation in which a reckless parent abandons her responsibility towards a minor. At best, this tale illustrates the detrimental impact of an open-ended status situation and the constraints on the use of privatisation to promote economic recovery. At worst, the narrative provides an embarrassing example of an international organisation's disastrous hesitations embodied in its failure to first assert, and then exercise, legal authority over an area as a 'surrogate state' due to ambiguity surrounding the scope of its rights and responsibilities. Creating acceptable conditions for private investment has become an essential part of state-building; UNMIK activities in this sphere may have been more successful had it been more willing to consider the link between economic progress and political stability and face up to its function as *government*.<sup>728</sup> UNMIK should have anticipated the trials and tribulations emerging from the contested conceptions of a trustee's functions and could have been counselled to request an early advisory opinion from the ICJ on this particular legal question arising within the scope of its activities.<sup>729</sup>

Regardless of the interpretation adopted, as international Board members remain unwilling to actively participate in the relevant decision-making process, an international administration's 'indecisionism' has spawned a dysfunctional regulatory body that remains unable to implement its mandate. This, in turn, has not only compromised the legitimacy of the process. The most negative impact of stagnation in the field of privatisation was felt by buyers of the tendered enterprises: the transfer of the SOEs was considerably delayed;

<sup>725</sup> S.12.3 and s.24.3(a) of UNMIK/REG/2002/12 respectively, *supra* note 713.

<sup>726</sup> Cf. Note to the SRSB (30 March 2004).

<sup>727</sup> The KTA completed three rounds of privatisation before the process was suspended in October 2003. See UNMIK Pillar IV, 'Statement to clarify the current situation regarding the privatisation process' (7 October 2003) as well as Sasha Brubanovic, 'Privatization Halted', *Balkan Reconstruction Report/Transitions Online* (13 October 2003, available at [www.tol.cz](http://www.tol.cz)). UNMIK/REG/2005/18 (22 April 2005), which amends UNMIK/REG/2002/12 (*supra*, note 713), now allows for a change of ownership for public purposes ('eminent domain') even if the SOE status of an enterprise is not yet fully determined. Accordingly, the KTA Board can now make final ownership determinations after the sale of assets. Whether this will lead to the re-constitution of the KTA board prior to the resolution of the immunity issue remains to be seen.

<sup>728</sup> Cf Henry H. Perritt, 'Stabilizing Kosovo: 'Enterprise Formation and Financial Markets', 2:2 *Journal of Global Financial Markets* 28-39 (2001), at 33-34 (arguing that in analogy to the trustee-occupant concept, UNMIK has the power to transfer trust property, even when a transfer cuts off reversionary interests, as long as it exercises this power in line with the terms of the trust). For a similar conclusion regarding UNTAET see Morrow/White, 'East Timor', *supra* note 504, at 43

<sup>729</sup> Article 96(2) of the UN Charter provides that "[o]ther organs of the United Nations and specialised agencies, which may at any time be so authorised by the General Assembly, may also request advisory opinions of the court on legal questions arising within the scope of their activities". The GA has previously authorised some UN organs to request opinions at any time, without requiring special authorisation for each individual case (cf. Mahnouch H. Arsanjani, 'Claims Against International Organizations: *Quis custodiet ipsos custodes*', 7:2 *Yale J of World Public Order* 131-176 (1980-1981), at 172, with reference). See also Karel Wellens, *Remedies against International Organizations* (Cambridge: CUP, 2002), at 232.



buyers had to start repaying the loans they engaged for the purchase, and the enterprises' economic activity ceased while buyers were prevented from managing them.<sup>730</sup> It has also undermined the UN mission's basic goal of creating a viable economy under the rule of law and has proven harmful to Kosovo's socio-political stability. In fact, control over some of Kosovo's most valuable public assets continues to be decided outside a legal framework, in various local disputes.<sup>731</sup>

### 5.3 UNMIK'S PROBLEMATIC PARTICIPATION IN STATUS NEGOTIATIONS

Having examined a governance sphere that plagued UNMIK in its first six years of existence, this chapter's final section now draws attention to the key actor in an internationalised territory and directs us to disaggregating the intersecting influences that converge around this bicephalous body in its agency and organic functions. It faces simultaneously 'outward' to the international community as a territorial agent, and 'inward' to a domestic audience as an international organ to perform the fiduciary bond. In its quality as *situated territorial agent* an international mission is constrained in its articulation by the operation of a fiduciary bond between it and the governed. In its corollary identity as *subsidiary organ* of the United Nations its mission is constrained in its 'domestic' strategic choices by international law and the politics of its mother organisation.<sup>732</sup> Both aspects are important to capture the nature of an international administration, and both impose constraints and supply resources. Yet, their simultaneous performance manoeuvres the territorial agent *qua* international organ into an untenable situation should it choose to participate in final status negotiations.

#### 5.3.1 OPTIONS FOR THE SECURITY COUNCIL

As the decision concerning the status of the entity over which the UN has temporarily assumed effective control has been deliberately left open, it will fall to the Security Council (SC) to determine this at a future point in time in the form of a resolution amending 1244. This, in itself, can be considered as a revolutionary moment in the Council's practice for the closest it has previously come to imposing territorial boundaries on a state was arguably its decision to demarcate the Iraq-Kuwait boundary under its Resolution 687.<sup>733</sup> In directing permanent change to the status and the political structure of territory still remaining within a state, the SC has two options, the first of which can be discarded at the outset.

The SC could opt to further expand its powers in a post-conflict administration context and vertically impose a permanent change in Kosovo's political status without the consent of the current holder of a *nudum jus* to exercise sovereignty to the extent that it deems such

<sup>730</sup> Institute for Development Research (Riinvest)/UNDP, *Early Warning System Project, Kosovo Report No. 6 (January-April 2004)*, at 17.

<sup>731</sup> Cf., e.g., Institute for War and Peace Reporting, 'Gangs and Red Tape Deter Investors', 6 April 2005.

<sup>732</sup> This re-states the conclusions we reached in the discussion of the dual roles of the UN Council for Namibia, *supra* p. 142.

<sup>733</sup> SCOR (XLV), 3 April 1991, UN Doc. S/INF/47 (1991), §§2-4, reprinted in 30 *ILM* 847 (1991). Here, the Council merely undertook to give precision to the boundary already concluded between the two states (see the Agreed Minutes Regarding the Restoration of Friendly Relations, Recognition and Related Matters, Kuwait – Iraq, 4 October 1963, 485 *UNTS* 321 (1964)).

determination necessary to the maintenance of international peace and security. Such a decision has no precedent in public international law. It would essentially imply that the international legal order draws the contours of state frontiers and grants title over territory to an entity that it simultaneously recognises as self-determination unit. Unilateral determination of a territory's status against the explicit wishes of the sovereign title holder may lie beyond the competences of the SC.<sup>734</sup>

The second option is more likely to materialise. The SC could endorse a horizontal agreement between the parties in a resolution based on Chapter VII. Negotiations will no doubt take the form of a general plurilateral (or limited multilateral) treaty.<sup>735</sup> Such 'Kosovo Accords', concluded under the auspices of the Contact Group, would effectively end the status of the 'international trust' and resolve the sovereignty puzzle. Parties to the determination of the future permanent political boundaries of the territory of Kosovo include, on the one hand, Serbia (and Montenegro) – the holder of a reversionary title to the exercise of sovereign powers – and on the other hand, Kosovo's local institutions. The latter will, in some form or the other, be supported by an UNMIK delegation (which remains authorised to represent the territory in its foreign affairs). Even to the casual observer of international relations, it is obvious that the double functions of an international territorial administration could collide at that point.

#### (i) WALKING THE TIGHTROPE: UNMIK'S DUAL FUNCTIONS

Resolution 1244 tasks UNMIK with facilitating "a political process designed to determine Kosovo's future status",<sup>736</sup> envisioning that at some point of the institution-building sequence, the UN's subsidiary organ will be called upon to participate in finding solutions to the permanent status of the territory it administers. The idea that UNMIK has to facilitate such dialogue is entrenched in the dominant culture of the UN Department of Peacekeeping Operations (DPKO), according to which a UN Mission supplies an element of disinterested outside assistance that can help the parties to disengage from a conflict.<sup>737</sup> This under-

<sup>734</sup> Chapter VII of the UN Charter arguably does not vest the UNSC with the power to prescribe changes in the international territorial order. As Klein concluded in 1980, "[d]ie Zuständigkeit der Vereinten Nationen zur Aufrechterhaltung des Weltfriedens und der internationalen Sicherheit im allgemeinen, aber auch die Befugnisse des Sicherheitsrates nach Kapitel VII im besonderen, ermächtigen...nicht zu territorialer Ordnung und Zuordnung" (*Statusverträge*, *supra* note 116, at 107). This view is shared by Stahn ('Constitution Without a State', *supra* note 607, at 541) as well as by T.D. Gill ('Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter', 26 *NYIL* 33-138 (1995), at 86). Matheson, on the other hand, believes that the SC has the competence to direct changes in political boundaries "if it should consider this necessary to restore and maintain international peace and security and if such measures are exercised in good faith observance of the Charter principles" ('Governance', *supra* note 33, at 85). Although referring to a territorial unit that was earmarked for self-determination, Judge Fitzmaurice's separate opinion is relevant to the case of Kosovo: "Even when acting under Chapter VII of the Charter, the Security Council has no power to abrogate or alter territorial rights... The Security Council might, after making the necessary determinations under Article 39..., order the occupation of a country or piece of a territory to restore peace and security, but it could not thereby, or as part of that operation, abrogate or alter territorial rights" (ICJ Reports 1971, *supra* note 56, at 294).

<sup>735</sup> See article 20(2) of the Vienna Convention on the Law of Treaties, *supra* note 386. 'Plurilateral treaty' means treaty participation which is open to a restricted number of parties and which purport to deal with matters of concern only to such parties.

<sup>736</sup> S/RES/1244 (1999), §11(e), with reference to the Rambouillet accords (S/1999/648).

<sup>737</sup> Impartiality and neutrality were laid down as principles of UN peacekeeping by SG Hammarskjöld in his 1956 report to the General Assembly on the first major UN peacekeeping operation, the

standing is deeply rooted in the UN's mediation experience stemming from situations in which it was invited to do so by the warring parties. A governance mission in which complete agency is assumed on behalf of a non-self governing territorial unit, is, however, fundamentally different from a situation in which the UN merely prods the parties to fulfil their promises. Yet not only was UNMIK set up by procedures that developed as part of standard UN peacekeeping; the mission continues to operate within the chain of command of the DPKO. In keeping with this tradition, UNMIK has already attempted to convene a forum in which it assumed the role of a 'mediator' with a view to facilitating a political process that would yield such a horizontal status agreement. The first round of technical negotiations between Kosovo and Serbian delegations held in October 2003 in Vienna, however, collapsed spectacularly.

An international agent representing an emerging entity of international law is, in this analysis, precisely the wrong policy institution to attempt to bridge the gap between claims to self-determination on the one hand, and to the reclamation of sovereign *dominium*, on the other. *In concreto*, a UN administrative mission is ill-suited to host, and even less suited to conduct, negotiations on the mandated territory's readiness to join the international community of states. Even to the novice, these two functions appear incompatible. Firstly, they involve the representation of territorial interests according to the fiduciary bond and their projection to the international arena. UNMIK's second function in this context involves its participation, as subsidiary organ of the Secretary General, in a horizontal agreement that provides the basis for a SC Resolution determining the future political status of the territory. Regardless of its substance, it appears deeply questionable whether the SC, as the final authority to authorise permanent changes to the political boundaries of a sovereign member state, can endorse a status treaty in whose negotiation it participated through a subsidiary organ of one of the UN's principal organs.

#### RÉSUMÉ

The decision to suspend a territorial dispute reflects one of the chief dilemmas of a post-colonial international law which upholds two sets of contradictory concepts: rights associated with territorial possession claimed by and on behalf of a sovereign on the one hand; and claims to sovereignty framed by and on behalf of a 'people', on the other.<sup>738</sup> June 1999 was merely the latest instance in which the institution of an international trust served to temporarily suspend state sovereignty while shying away from identifying a unit of self-determination which would, in time, be entitled to formulate and exercise its claim to the disputed territory.

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United Nations Emergency Force. Cf. Report of the Secretary-General, *Study of the UNEF Experience* (9 October 1958), UN Doc. A/3943, at §12. On the issue of the impartiality of peacekeeping mandate see Ratner, *Peacekeeping*, *supra* note 101, at 25-41 and 55-56 and Jane Boulden, 'Mandates Matter: An Exploration of Impartiality in United Nations Operations', 11 *Global Governance* 147-160 (2005). The conceptual underpinning of disinterested neutrality that characterized the 'new peacekeeping' was criticized in the 'Brahimi Report': 'impartiality is not the same as neutrality or equal treatment of all parties in all cases for all time, which can amount to a policy of appeasement' (*supra* note 33, at §50).

<sup>738</sup> This dichotomy was discussed in Chapter III. For a neo-Kelsenian re-interpretation of the promise of self-determination as an application of the principle of non-intervention, cf. Christopher M. Ryan, 'Sovereignty, Intervention and the Law: A Tenuous Relationship of Competing Principles', 26:1 *Millennium: Journal of International Studies* (1997), at 176.

The 'standards before status' approach, so closely fashioned after policies of conditionality and the idea of 'earned sovereignty', operates in almost naïve denial of the continued relevance of self-reliant statehood. Serbia's assertion of sovereign rights over the territory thus hovers perpetually in the background of Kosovo politics, menacingly to some, beguiling to others. The history of institution building over the past six years suggests that exhorting civil virtues of minority protection and good governance is, in the absence of real incentives, an inadequate means of engendering normative change in a post-conflict setting. It has reinforced a climate of heightened insecurity in which the conflict remains frozen rather than resolved. Under the stewardship of the former SRSG *Holkeri*, Kosovo spiralled into a wave of violence that, in March 2004, exposed UNMIK's veritable governance crisis.

The eclectic mix of models devised to respond to this crisis included a proposal that the transfer of competencies to local institutions be accompanied by a more 'neocolonialist' posture: "The new SRSG should be prepared to introduce a robust policy of interventions and sanctions in cases of inappropriate performance [of local actors]."<sup>739</sup> This ambiguous recommendation serves to underscore a highly significant point: an 'open-ended' setting in which the future status of an entity will be negotiated on the basis of the performance of local agents increases the hurdles on the path to maintaining a coherent political structure that enables the international agent to renounce its 'proconsular role' and exit. This call has apparently been heeded by the successor SRSG, *Jessen-Petersen*, who declared upon his arrival in Prishtina: "I think there is a limit to how long you can keep a place in limbo."<sup>740</sup>

As *Axelrod* has observed, for cooperation to prove stable, the future must have a sufficiently large shadow that is cast in a stable set of relationships and expectations.<sup>741</sup> The *Eide Report* addressed those systemic constraints that arise from the absence of a 'shadow'. With undisguised impatience it concluded that

[u]nfulfilled aspirations and ambitions cannot be handled by policies without a clear political perspective... [W]ell functioning institutions depend on a strong sense of local ownership. Such ownership cannot be achieved if the owners do not know what they own and what they are intended to govern... The 'standards before status' policy is untenable in its present form. It must be replaced by a broader policy where standards implementation takes Kosovo in an orderly way from the present through future status discussions and into a wider regional and European integration process. In the current situation... we can no longer avoid the bigger picture and defer the most difficult issues to an indefinite future.<sup>742</sup>

The privatisation tale illustrated that in circumstances where final 'ownership' over both economic resources and the political process is deferred, an international territorial agent may be torn asunder by two contradicting sets of interests it purports to pursue: the economic interest of the territorial entity on the one hand, and the international legal interest in the maintenance of SCG's territorial integrity (which includes the protection of its reversionary title to exercise state functions, should a determination of Kosovo's final status be made in this direction), on the other. Trusteeship of publicly owned assets proved to be a

<sup>739</sup> *Eide Report*, supra note 513, at 5.

<sup>740</sup> UNMIK Press Conference, Prishtina, 7 August 2004.

<sup>741</sup> Robert Axelrod, *The Evolution of Cooperation* (New York: Basic Books, 1984), at 174.

<sup>742</sup> *Eide Report*, supra note 513, at 13 and 16.

double-edged sword which divided an international administration to an extent that it abandoned its responsibility to wield authority for the greater good of Kosovo's economy and society. The pursuit of objectives that are perceived to be in possible contradiction with each other yields negative externalities. One of the objectives of this chapter has been to demonstrate that an ambiguous mandate can render an international administration an inherently unstable, if not destabilising, policy institution. What we might term the tragedy of its 'civilising mission' in ambiguous, open-ended circumstances, an international agent has, six years into an institution-building mandate, shown itself incapable of administering an important part of the public economy.

In endeavouring to facilitate negotiations over the territory's final status, UNMIK may even deviate from the fiduciary duties it has assumed as territorial agent, as is the case with the privatisation of public assets. Such duties include the *bona fide* representation of the territory held in trust vis-à-vis the outside world as well as the compelling and overriding obligation to give primary consideration to the interests of the territory and its people.<sup>743</sup> For these reasons, UNMIK cannot allow itself to be cornered into checkmate where its roles of territorial agent and international organ are mutually compromised. As the International Crisis Group recently argued, the UN Secretary General should, in consultation with the Contact Group, appoint a Special Envoy to conduct exploratory discussions on Kosovo's final status to "move the issue into high gear".<sup>744</sup> The appointment of a mediator other than UNMIK would help avoid a conflict of interest. Alternatively, it is conceivable for a UN SRSG to assume the role of an 'honest broker' in status discussions while UNMIK's jurisdiction is transferred to the European Union which would administer the international trust (EUMIK) through the grant of a 'special membership' to Kosovo.

The legacy of the UN Council for Namibia bolsters the argument that the same agency cannot simultaneously conduct *bona fide* negotiations with concerned parties, and perform the ward's interests. In this case, the UN Council's functions as administrative organ of the territory were separated from that of the SRSG, whose functions were framed independently to facilitate diplomatic negotiations.<sup>745</sup> The events of spring 2005, in which UNMIK's capacities were pointlessly stretched as it tried to facilitate meetings between Kosovo's President and Prime Minister and their counterparts on the SCG and Serbian side<sup>746</sup> lend credence to the claim that UNMIK's administrative and representative activities should, once and for all, be detached from wider questions concerning the territory's future status. A sounder approach could involve the Security Council's utilisation of its Provisional Rules of Procedure allowing for the appointment of "a commission or committee or a rapporteur for a

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<sup>743</sup> Integrating the principle of good faith into the law of the Charter, Article 2(2) provides that "all Members...shall fulfil in good faith the obligations assumed by them in accordance with the present Charter". This principle was arguably breached in the case of Nauru's administration under the Mandate and Trusteeship systems (Weeramantry, *Nauru*, *supra* note 524, at 307 *et seq.*). Although the obligation refers to members in the first place, there are strong arguments that it extends to UN organs as well: "It would be fantastic to assume that United Nations...agencies are authorized to violate the principles they were established to serve" (Arsanjani, 'Quis custodiet', *supra* note 729, at 133. For a discussion cf. also Schweigman, *Security Council*, *supra* note 7, at 173-178).

<sup>744</sup> ICG, *Kosovo: Towards Final Status* (Europe Report No. 161, 24 January 2005), at 23.

<sup>745</sup> Cf. Chapter II.2.3 (iii), *supra* p. 83.

<sup>746</sup> Cf. International Crisis Group, *Kosovo After Haradinaj* (Europe Report No. 163, 26 May 2005), at 26.

specified question".<sup>747</sup> The determination of territorial status, conducted in the context of a structured forum independent from a territorial administration, should witness UNMIK solely representing the territory's interests, in good faith and in close collaboration with local institutions.

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<sup>747</sup> Provisional Rules of Procedure of the Security Council, Rule 28, UN Doc. S/96/Rev.7 (1983). The basis for this rule is found in Article 29 of the UN Charter: "The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions".

## CHAPTER VI

### LAW AND LEGITIMACY IN AN INTERNATIONALISED TERRITORY

*'Legitimacy is most articulated when it justifies the actions of governors rather than when it explains the subjection of subjects...'*<sup>748</sup>

The previous chapters of this thesis were devoted to an appraisal of the position of a non-state territorial entity subject to temporary administration by an international organisation and its status in the international legal order. From an *in rem* perspective, we concluded that the Security Council pierced the layer of Yugoslav sovereignty and reduced its entitlement to rule over a bounded territory to a *nudum jus*. From an obligation perspective, we noted that the investiture of an international organ to perform a fiduciary bond has further 'de-sovereignising' effects. In the previous chapter we then addressed concrete issues arising from the problem of residual sovereignty and the extent to which it derails an international mission's institution-building sequence under an open-ended mandate.

Given the scope of authority the United Nation has taken upon itself to exercise as territorial administrator, it is, as Korhonen correctly remarks, rather surprising that the issue of the 'legitimacy' of the internationalisation of state structures through international post-conflict governance has so far inspired little debate beyond the old peacekeeping discourse.<sup>749</sup> This chapter hence turns 'inwards' in an attempt to more succinctly define the properties of a temporary coercive order established by an international territorial administration. It is generally concerned with phenomena accompanying an international legal and political authority as it 'meets', and interlaces with, a municipal legal and political order. Upon consideration, the metaphor of 'encounter' is not at all ill-conceived. The first section will inquire into some of the problems of an international political authority as it tries to assert itself in relation to both a 'domestic' and an international audience. The second section argues that the unmediated import of international legal forms into thus internationalised territories creates partially defective legal orders in which international authority remains beyond challenge. The phenomena observed are inherently contradictory. On the one hand, they confirm our suppositions about the fundamentally liberalising agenda of international administrations. On the other, they do not conform to some of the ideal conceptions of the rule of law which we wish international administrations to 'transplant' into foreign settings. The analysis of a temporary legal order, presented in the second section of this chapter, will thus follow a more normative perspective exploring the extent to which legitimacy is contested in situations of temporary UN territorial governance.

More specifically, this chapter ponders the following four questions: (i), on what arguments does an international territorial administration base its claim to the 'legitimate' exercise of power and towards which audience does it address these arguments?; (ii), what informs the work of the international community as it internationalises territories and could a 'transitional paradigm' capture the anomalies we encounter in such a temporary normative order?; (iii), what functions does such a transitional legal order serve and which specificities does it exhibit?; and (iv), what are the challenges faced by an international administration in the

<sup>748</sup> Rodney Barker, *Political Legitimacy and the State* (Oxford: Clarendon Press, 1990), at 190.

<sup>749</sup> 'International Governance', *supra* note 598, at 526.

construction of a transitory administrative system that should provide the foundations for a liberal future? In answering some of these questions, our assumptions are guided by an understanding that 'legitimacy' is not a single quality or characteristic that a system of government possesses but a set of distinct criteria that operate on different levels. As *Beetham* lucidly observes, each of these multiple criteria provides grounds for compliance or cooperation on the part of those subordinate to a given power relation.<sup>750</sup>

The 'anomalous' situation created by the exercise in internationalised territories has been abundantly emphasised before when we dealt specifically with the extent of UN authority in Kosovo. To recapitulate, the anomaly stems from the position of an internationalised territory as directly submitted to international law and possessing an agent that 'performs' the partial legal personality of the territory. In the following discussion we shall argue that the notion of legitimacy exhibits a number of abnormalities as well, notably an instability which mirrors the fluctuations in the structure of political institutions tenuously tied together by a 'dual-key' governance framework. Our analysis will not, however, dwell in exceptionalism for too long. Arguments framed as claims to legitimate government have typically cross-temporal and cross-spatial significance. A historical parallel may be appropriate. Enlightened monarchs such as Joseph II of Austria based their claim to *potestas imperandi* increasingly on the *salus publica* rather than on their feudal title to the exercise of authority. As *Kratochwil* observes with reference to the rule of the late 18<sup>th</sup> century Habsburgs, this new conceptualisation of legitimacy had two implications:

it raised the issue of popular participation in the determination of public policy conceived as the exercise of sovereign rights, and it provided the decisive wedge to distinguish between the interest of the state (and later, of the 'people') and that of the sovereign.<sup>751</sup>

One conclusion of this chapter's first section is that an international territorial authority needs to concern itself with the legitimacy of its rule, as seen through the eyes of the people under its tutelage. In order to underline the shift in argument that is designed to bolster the legitimacy of rule and domination, an international territorial administration should adjust its idiom of 'empire' to enlightened conception of service to the entity it holds in trust.

#### INTRODUCTION: PREMISES AND CHALLENGES

At the outset, it is advisable to spell out what this analysis will not touch upon. Our elaboration of political authority does not claim to advance a sector-specific theory of legitimacy or regime design; it proposes no compelling basis for the legitimate exercise of extensive powers in an internationalised territory. Nor is it our intention here to 'measure' legitimacy according to pre-established criteria, to establish a typology of modes through which authority is legitimised, or to empirically identify which mechanisms of social control might operate better in a real-world situation such as Kosovo. While there are myriad reasons for the erosion of political authority – corruption, local obstructionism, a failure to promote government transparency, a tenuous link between civil administration and the military command structure, the operation of (inter)national networks of patronage, sheer incompetence, to name a few – this analysis seeks to stress some of the *inherent* tensions

<sup>750</sup> David Beetham, *The Legitimation of Power* (London: Macmillan, 1991), at 20.

<sup>751</sup> 'Dominium', *supra* note 40, at 30.



underlying international institution-building. We portray the dynamics that unfold in a process in which notions of legitimacy are subject to *institutional* contestation. We shall introduce the variety of actors operating in an internationalised territory as they approach the problem of social control, and as the quest for legitimacy creates tensions between them.

This project presents us with two major challenges. The first relates to our treatment of aggregate social preferences called 'interests', the second concerning the inapplicability of 'voluntarist' models to provide a foundation for legitimacy in an internationalised territory. Firstly, given the ecumenical quality of the concept of legitimacy, we must assume the existence of unitary rational actors whose actions are purposive, and who represent social preferences. For our treatment of legitimacy to be coherent, we suppose that we can aggregate social preferences from a community that is in the process of establishing itself as *polis*. After all, the notions of legitimacy and 'public interest' are intrinsically interwoven, with the latter functioning to justify claims and demands in the name of the *communitas* ('public policy') and obliging its members to defer the pursuit of diverging individual preferences.<sup>752</sup> Following a liberal conception of domestic politics, we assume that emerging political institutions are equally capable of representing some subset of domestic society and hence of expounding a common will or a common interest; they represent the 'transmission belt' by which the preferences of groups are translated into policy.<sup>753</sup>

The treatment of a polity as capable of holding, and expressing, social preferences and intentions through policies cuts deeply into the debate that has been bubbling through social sciences for some years. At issue here is the ontological status of the state and, in particular, the agent-structure problem – whether the assumption of corporate agency denudes the social field of human agents.<sup>754</sup> The "attempt to breathe life into collective social forms" is, of course, challengeable.<sup>755</sup> By assuming that an agent of a polity can indeed frame normative claims that express aggregate social preferences and 'collective sentiments' held by human agents, we do not mean to anthropomorphise a polity beyond the extent necessary to juxtapose sets of preferences held by bureaucratic actors that are engaged in a discourse over the exercise of social control in a 'dual governance' setting. For the purposes of this chapter, it will therefore suffice to delineate the notion of 'territorial' interest and contrast it to the *Staatengemeinschaftsinteresse* a fiduciary administration is

<sup>752</sup> This account thus goes beyond the circumscription of interests as idiosyncratic preferences. Interests, following Kratochwil, stand for preferences that "ought to be chosen because certain reasons can be marshalled to support this claim when challenged". See his illuminating 'On the Notion of "Interest" in International Relations', 36:1 *International Organization* 1-30 (1982), at 6.

<sup>753</sup> Andrew Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics', 51:4 *International Organization* 513 (1997), at 518 *et seq.* This transmission belt is, of course, restrained as the international administration remains in charge of setting the agenda for numerous policy areas.

<sup>754</sup> See, e.g., Alexander E. Wendt, 'The Agent-Structure Problem in International Relations Theory', 41:3 *International Organization* 335 (1987); Martha Finnemore, *National Interests in International Society* (Ithaca/London: Cornell UP, 1996), at 14-31; Roxanne L. Doty, 'Aporia: A Critical Exploration of the Agency-Structure Problematique in International Relations Theory', 3:3 *EJIR* 365 (1997).

<sup>755</sup> Colin Wight, 'State Agency: Social Action Without Human Activity?', 30 *Review of International Studies* 269 (2004), at 273. Cf. also Hidemi Suganami, 'On Wendt's Philosophy: A Critique', 28 *Re-view of International Studies* 23 (2002). For a critical study of 'organologic' metaphors in social science used by, *inter alia*, Durkheim and Tönnies see Susanne Lüdemann, *Metaphem der Gesellschaft. Studien zum soziologischen und politischen Imaginären* (Munich: Wilhelm Fink Verlag, 2004).

bound to pursue as a subsidiary organ of the UN Secretary-General. One backdrop to our focus will however consist in the weakness and generality of its core presuppositions which we already discussed in Chapter IV: that there indeed exists an 'international society' that has developed a specific framework – a plurality of rules – that allows for the formulation of a set of community interests, pursued with the same intensity through one of its organs, and for the evaluation of the latter's performance against its set of social preferences. Even more problematically when discussing international legitimacy, we will have to presuppose not only a set of rules but also an 'order' that sustains certain community interests and which provides an international value system against which it is possible to make judgments about the legitimacy of international institutions, practices and procedures.<sup>756</sup> It is important to note at this point that by providing necessary but not sufficient causes for a process of delegitimisation to occur, and by relying on probabilistic rather than deterministic causes, our narrative is underpredictive.

Secondly, theories of legitimacy that build on voluntarist models and international law's strong consensualist basis for obligation<sup>757</sup> encounter difficulties when approaching a situation in which an international territorial administration's mandate is, as some would say, unprecedentedly 'deep', and its temporal width undefined. In an internationalised territory, the question of legitimacy is necessarily one of domination, not of consensual assumption of obligation. Challenges to the legitimacy of international territorial rule in Kosovo are also advanced from a foundational point of view as the existence of such a mission was predicated on the *breach* of a (presumably 'legitimate') international rule of non-intervention. Moreover, the unaccountability of international authorities has been used as a key explanatory variable to capture phenomena of the erosion of international political authority in a territory held in trust. Our discussion of the notion of accountability in the second part of this chapter is therefore closely related to that of legitimacy. Like legitimacy, accountability is a relational concept, denoting the interaction between the accountable (the holder of authority) and the accountee (the authority to whom accountability is owed) with respect to the task which has been the object of a delegation of power by the latter.

The majority of social scientists writing about legitimacy during the second half of the last century have identified legitimacy in an 'attitudinal' sense, focusing on perceptions and orientations towards society or its regime. In this, they take themselves as following *Weber's* social theory of *Herrschaft* in which he distinguished between perceived legitimacy and the qualities of legitimacy in an order itself.<sup>758</sup> An institution perceived as legitimate gives rise to

<sup>756</sup> John Williams, *Legitimacy in International Relations and the Rise and Fall of Yugoslavia* (New York: St. Martins Press, 1998), at 12.

<sup>757</sup> Cf. Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?', 93 *AJIL* 596 (1999), at 597.

<sup>758</sup> One prominent proponent of the Weberian view sees legitimacy as means to "designate the beliefs and attitudes that members have toward the society which they make up" (Charles Taylor, 'Alternative Futures: Legitimacy, Identity, and Alienation in late 20<sup>th</sup> Century Canada', in *Communitarianism: A New Public Ethics* (ed. by M. Daly, Belmont, CA.: Wadsworth, 1994), at 58). Franck suggests that "in a community organised around rules, compliance is secured...by perception of a rule as legitimate by those to whom it is addressed" ('Legitimacy in the International System', 82 *AJIL* 705-759 (1988), at 706). Another sociologist identifies legitimacy as a "generalised perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed systems of norms, values, beliefs, and definitions" that furthers compliance (Mark C. Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches', 20:3 *Academy of Management Review* 571-610 (1995), at 574). For three critiques of the 'subjectivist'

symbols possessing a mobilising power to instigate social action because of their association with the institution and the political process.<sup>759</sup> In turn, perceptions of legitimacy lead actors to behave differently than they otherwise would, because they believe an institution requires them to. The agent recognised in a community as authorised to make such a dispensation of symbols is in a position of power relative to the rest.<sup>760</sup>

Yet, as *Hurd* also suggests, it is power in a broader sense rather than the coercive power of the bully: "[T]he character of power changes when it is exercised within a structure of legitimate relations, and the two concepts of power and legitimacy come together in the idea of 'authority'".<sup>761</sup> For this transformation to occur, a belief system must emerge that legitimates the exercise of control.<sup>762</sup> Legitimacy is hence understood to be 'socially constructed' in that it reflects a congruence between the behaviour of the entity that claims legitimacy and the shared beliefs of a social group.<sup>763</sup> As *Clark* emphasises, this subjectivist Weberian approach leaves the task of developing exogenous schemes of adjudging the legitimacy of a political system to political philosophy, and concentrates instead on the quality of the endogenous relationship.<sup>764</sup> In the exogenous sphere, the emergence of a system which furnishes the basic distinguishing legitimising criterion of authority is then seen as crucial to the efficiency of social action. As a device of social control, legitimacy is believed to have long-term advantages over coercion in reducing enforcement costs.<sup>765</sup> In times of adversity, widespread belief in an organisation's good character may dampen the delegitimising effects

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approach, and a more normative conception that posits legitimacy as the moral right of an institution to impose political obligations see A. John Simmons, *Justification and Legitimacy. Essays on Rights and Obligations* (Cambridge: CUP, 2001), at 134-157; Frederick M. Bamard, *Democracy and Legitimacy. Plural Values and Political Power* (Montreal: McGill-Queen's UP, 2001), at 30-33; and Beetham, *Legitimation*, *supra* note 750, at 8 *et seq.* (arguing that Weber's influence on the subject of legitimacy has been an "almost unqualified disaster").

<sup>759</sup> Cf. David I. Kertzer, *Ritual, Politics and Power* (New Haven, Yale UP, 1988), at 5-14.

<sup>760</sup> Ian Hurd 'Legitimacy, Power, and the Symbolic Life of the Security Council', 8 *Global Governance* 35-51 (2002), at 38.

<sup>761</sup> 'Legitimacy and Authority in International Politics', 53:2 *International Organization* 379 (1999), at 401-402. In the same vein, Inis Claude observed that power and legitimacy are not antithetical, but complementary. Legitimacy "makes all rulers more effective – more secure in the possession of power and more successful in its exercise" ('Collective Legitimation as a Political Function of the United Nations', 20 *International Organization* 367 (1966), at 368 *et seq.*).

<sup>762</sup> Max Weber, *The Theory of Social and Economic Organization* (New York: OUP, 1947), 101-109.

<sup>763</sup> Cf. Suchman, 'Managing Legitimacy', *supra* note 758, at 574, and Beetham, *Legitimation*, *supra* note 750, at 100 *et seq.*

<sup>764</sup> Ian Clark, 'Legitimacy in a Global Order', 29 *Review of International Studies* 75-95 (2003), at 79-80.

<sup>765</sup> Hurd, 'Legitimacy and Authority', *supra* note 761, at 388. This is a fair assumption which does not, in a way, interfere with the more complex issues of finding a methodology for interpreting the motives for behaviour that happens to be in compliance with a certain directive. As Weber put it, "the merely external fact of the order being obeyed is not sufficient to signify domination in our sense; we cannot overlook the fact that the command is accepted as 'valid' norm" (*Economy and Society: An Outline of Interpretative Sociology* (Vol. II, ed. by G. Roth and C. Wittich, Berkeley, CA: University of California Press, 1978), at 946). Connecting the level of effectiveness to the level of legitimacy, Lipset argued that long-term effectiveness can to some extent compensate for insufficient legitimacy, while strong legitimacy can compensate for insufficient effectiveness (*Political Man. The Social Bases of Politics* (Baltimore: JHU Press, 1981), at 64. It would, however, be a mistake to regard legitimacy as a necessary condition for effective government; the two are not interdependent but separate issues (Barker articulates this concern in *Political Legitimacy*, *supra* note 748, at 14). Following these caveats, we avoid advancing an argument for a causal relationship between legitimacy and stability within an 'internationalised' polity. As Clark correctly points out, the causality also works in the opposite direction ('Legitimacy', *supra* note 764, at 95).

of failures, miscues, and reversals. An organisation that is perceived as legitimate is in a position of power over the actor; legitimacy becomes the "reservoir of loyalty on which leaders can draw".<sup>766</sup>

Having introduced the relational nature of the notion of legitimacy, we have so far concluded that nothing is legitimate in itself but only in relation to an audience. 'Legitimacy' in the Weberian conception thus has two aspects: it both contributes to domination, and justifies it. It is both a belief held by subjects and a claim made by rulers.<sup>767</sup> The object of legitimacy – a government – raises a claim of legitimacy, and the conditions for meeting this claim are dependent on an audience as a party to the relationship.<sup>768</sup> Applied to our investigation, this implies that we will have to circumscribe the discursive spheres in which a claim to legitimate government is framed. The next section hence distinguishes conceptually between 'domestic' and 'international' legitimacy, for we believe that each sphere involves a special audience perceptive to diverse arguments about the nature of authority. While borderline cases exist, we will, for heuristic purposes, treat notions of international and domestic legitimacy as discrete discursive contexts in which different strategies of legitimisation are pursued.

## 6.1 THE ANOMALOUS LEGITIMACY CYCLE

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The contours of legitimacy are most clearly discernable when it is contested. In Kosovo, diverging conceptions of government produced negative externalities and generated unstable equilibria. The following discussion attempts to explain some of the reasons behind processes of de-legitimisation. The first section conceptualises the notion of legitimacy in order to develop a framework in which we can locate the internal dynamics of normative change in an internationalised territory. The analysis proceeds in essentially two stages. Firstly, we attempt to describe the basic components on which legitimacy in an asymmetrical 'dual-key' constitutional arrangement rests. We conclude that it rests on a process that seeks to gradually devolve public authority from an international agent to local institutions. Secondly, we suggest that international agents and local actors rely on discrete sources of legitimacy to justify the exercise of public power. A discussion of the situation in which international and local actors are posited side by side, both exercising social control through reference to different sources of authority, provides a vital key to understanding the tensions which *may* accompany the presence of an international territorial administration. Of particular significance will be the realisation that efforts to legitimise the exercise of international power in a domestic setting can generate efforts by local institutions to de-legitimise the former and jeopardise the projected sequence of devolving competencies. This preliminary conclusion is indispensable for a wider argument that in an anomalous situation in which legitimacy is contested between international and local institutions, their interactions can affect the trajectory of normative change.

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<sup>766</sup> Tom R. Tyler, *Why People Obey the Law* (New Haven: Yale University Press, 1990), at 26.

<sup>767</sup> Barker, *Political Legitimacy*, *supra* note 748, at 59.

<sup>768</sup> Kaarlo Tuori, *Critical Legal Positivism* (Burlington, VT: Ashgate, 2002), at 246.

### 6.1.1 A TRANSITIONAL ADMINISTRATION IN TRANSITION

*'No ethnic ties, no shared traditions, no voluntary act of political confidence unite the rulers and their subjects.'*<sup>769</sup>

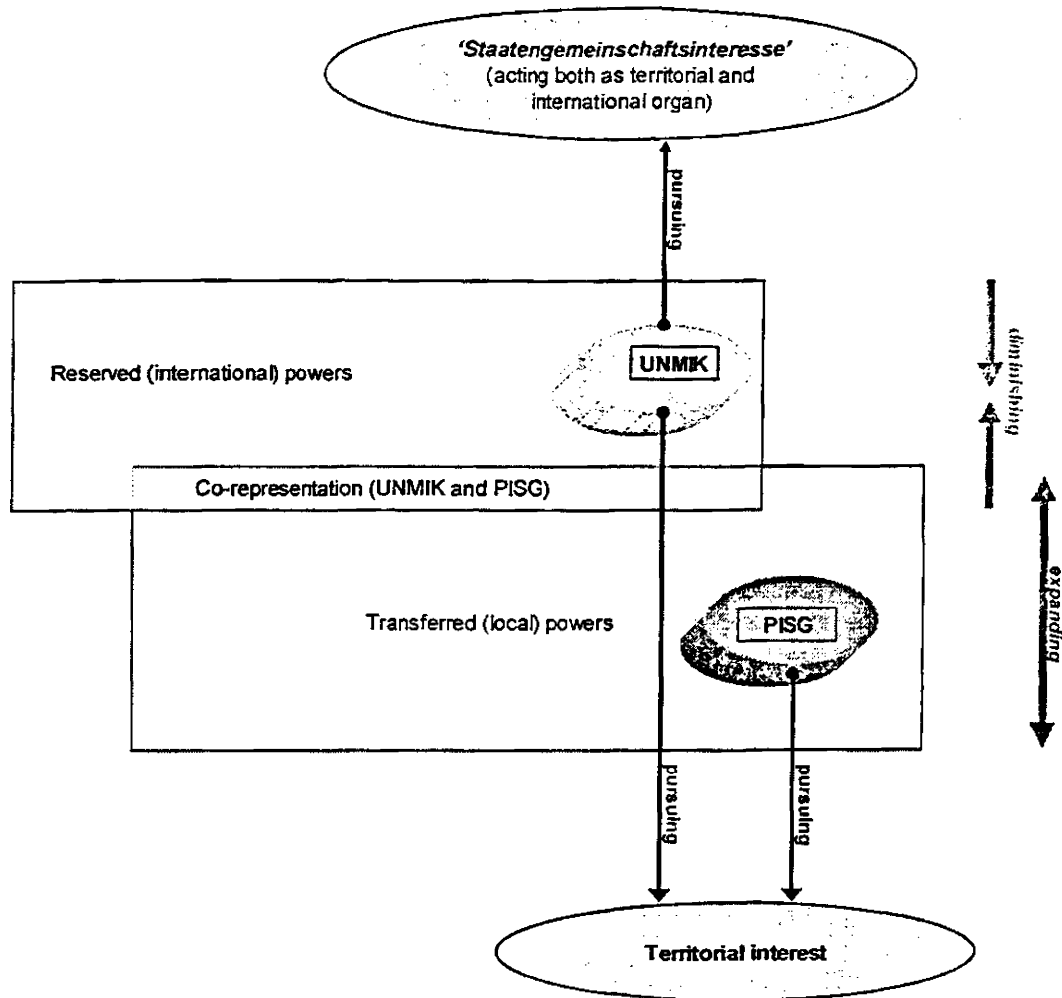
As we have already explained in the previous chapter addressing UNMIK's relations to the nascent Provisional Institutions, the pronouncement of the Constitutional Framework entrenched a highly dynamic mechanism of dual-key governance. A focus on the division of powers between international and local actors and on their respective strategies of legitimisation further assists us in approaching issues of legitimacy in an internationalised territory. The following sketch represents a live snapshot of an institution-building process in which competencies are successively transferred from an international to a local agent under an asymmetrical constitutional co-government arrangement, the specific legal parameters of which will be addressed in the second section of this chapter. This arrangement constitutes a *sui generis* type, loosely bounded political system in which policy is made by both international and national institutions, and its exercise depends on the coordination of a range of political and military organisations. Along the unfolding institution-building sequence, the international agent is vested with a (decreasing) measure of *Organisationshoheit* – the authority or competence to draw up a constitution, to choose a system of government, and to obtain means to enable the 'state' to execute its functions. The local institutions, on the other hand, will gradually assume competencies for a certain range of issues and discharge municipal functions according to their autonomous sphere of action (*autonomer Wirkungsbereich*).<sup>770</sup>

In accordance with Talbott's designation of Kosovo as a "ward of the international community",<sup>771</sup> we can compare the fluid matrix of competences of the emergent local institutions with the capabilities of a minor who grows into a certain age. Similarly, the competencies of the guardian should be seen to shrink as they are matched by the increasing capacity of the ward. The local institution's competence within their autonomous sphere will continue to be subject to the international agent's supervision while the range of competencies tends to increase. This model seeks to encourage pluralism in order to enhance legitimacy and local 'ownership' of measures undertaken during the transition.

<sup>769</sup> Ernst Fraenkel, *Military Occupation and the Rule of Law: Occupational Government in the Rhineland 1918-1923* (Oxford: OUP, 1944), at 205.

<sup>770</sup> Cf. Verdross, *Völkerrecht*, 5<sup>th</sup> ed., *supra* note 45, at 195. An example of a local power-sharing agreement that delineates the spheres of competence of the international and local actor while providing the former with a supervisory competence over the latter can be found in the Art. II of Annex 10 of the Dayton Agreement which obliges the High Representative to "respect [the local institution's] autonomy within their spheres of operation while as necessary giving general guidance to them about the impact of their activities on the implementation of the peace settlement" (35 ILM 35 (1996), 147 *et seq.*).

<sup>771</sup> Strobe Talbott, 'The Balkan Question and the European Answer', Address at the Aspen Institute (Aspen, 25 August 1999), at 5; quoted in William Bain, 'The Political Theory of Trusteeship and the Twilight of International Equality', 17:1 *International Relations* 59 (2003), at 69.



There is no doubt that the co-government model presents a significant innovation in post-conflict governance, fostering both short-term legitimacy and long-term democratisation. Albeit grossly simplified, the above sketch however illustrates the observable tensions between the constitutionally entrenched local institutions and their continuing supervision by UNMIK. At a particular point of the institution-building trajectory, the two actors might occupy opposing positions based on the pursuit of conflicting sets of 'interests', or corporate intentions. The example of privatisation, discussed in detail in Chapter V.2.2(i), illustrated the dilemma of the pursuit of pursuing divergent 'interests': While the provisional institutions of self-government (PISG) have, since 2002, pursued an intensive campaign to kick-start the privatisation of public assets in Kosovo, the international agent has stalled the process by its continued recourse to international law and the limits it imposes on UNMIK in its fiduciary exercise of powers.<sup>772</sup>

#### (i) THE TWO DIMENSIONS OF THE LEGITIMACY DISCOURSE

Political transitionality provides the tableau against which the following discussion on the sources of legitimacy can be projected. By now it should be apparent that our attempts, in

<sup>772</sup> *Supra* p. 179.

the previous paragraph, at framing the tensions between international and local institutions in the terminology of pursuing differing sets of 'interests' can be easily recast in the palette of legitimacy. We mean nothing else than to suggest that international and internal legitimacy may be negatively correlated. Consider a line that frequently appears in our political vocabulary when we, usually in a condescending manner, refer to a particular governmental policy as "designed for local consumption". We mean simply that internal, or domestic, 'interests' are pursued at the expense of international legitimacy. Accordingly, we will set apart these two target audiences when investigating claims to legitimate government.<sup>773</sup>

Firstly, we consider the international validation of UN governance of a territory. We term this sphere *international legitimacy* because the UN addresses its claims to legitimate government towards an international constituency, particularly donor countries.<sup>774</sup> As the sequence of institution-building unfolds, the SRSG, in whom the executive, legislative and judicial powers are initially combined, relies on a multi-faceted set of arguments to justify the exercise of largely unchecked powers. His arguments appeal directly to and articulate the shared values of the international community.<sup>775</sup> They are largely framed to convince the international public that its sundry actions are consistent banal with established best practices of good governance.<sup>776</sup> The importance of those legitimising strategies in the case of Kosovo's international administration cannot be overstated. UNMIK was not, like UNTAET, legitimised by the obligations of trusteeship that applied to non-self-governing territories. Nor can its exercise of power be based on an international treaty, sanctioned by the consent of the contracting parties, as in the case of Bosnia. As Bain lucidly observes, UNMIK was created in the wake of a "controversial, if not dubious, use of force that obtained retroactive assent from the Security Council in form of resolution 1244".<sup>777</sup> Without international validation – which, one might add, cannot be taken for granted – the task of UN territorial governance is fraught with difficulty. Legitimacy in the eyes of a global audience naturally increases with the representativeness of such an administration (in terms of participating states and the availability of lead-nation resources), with the rate at which an 'exit strategy' is formulated and with the speed at which the devolution of government power to local institutions takes place.<sup>778</sup>

<sup>773</sup> This categorisation is inspired by Thomas M. Franck, 'Legitimacy and the Democratic Entitlement', in *Democratic Governance and International Law* 25 (ed. by G.H. Fox and B.R. Roth, Cambridge: CUP, 2000), at 29. The separation of 'target audiences' in the legitimacy debate within an internationalised territory is, of course, highly artificial, yet required by our earlier conclusions about the dual functions of an international administration. See Chapter IV.1.3, *supra* p. 128.

<sup>774</sup> Cf. the reference to the UN Security Council and donor countries as UNTAET's primary 'constituencies' in Joel C. Beauvais, 'Benevolent Despotism: A Critique of U.N. State-building in East Timor', 33 *NYUJILP* 1101-1178 (2001), at 1106 and 1166.

<sup>775</sup> For the problematic notion of international community interest see, however, the introduction to Chapter IV, *supra* p.120.

<sup>776</sup> A UNDP report, for instance, notes the "inevitable importance of being able to show concrete and tangible results for public consumption in donor countries" (*Governance Foundations*, *supra* note 512, at 28).

<sup>777</sup> Bain, *Anarchy*, at 153.

<sup>778</sup> A similar argument is presented by Harland, 'Legitimacy', *supra* note 484, at 18 as well as by Caplan, *International Governance*, *supra* note 19, at 34. For the argument that the UN is affected by the shift from 'traditional' to 'performance criteria' of legitimacy as are states, see James N. Rosenau, 'The United Nations in a Turbulent World', *International Peace Academy Occasional Paper Series* (Lynne Rienner, 1992), at 52: "Its legitimacy is bound to undergo incremental enrichment as it becomes even more enmeshed in...world politics and enjoys successes that are

Secondly, we consider the UN's authority within the territory where it exercises the function of government. We term this sphere *domestic legitimacy*. As a relational concept, domestic legitimacy captures the properties of the performance of the fiduciary bond in which an international agent is appointed *ex lege* to supervise a formally constituted, locally based management structure operating with respect to a particular territorial unit.<sup>779</sup> As the UN conceives 'good governance' as *ersatz* for democratic legitimisation in an internationalised territory, it is important to note that its claim to legitimacy is based on the exercise of its powers in a manner inviting societal trust. In the words of Caplan, "the idea of international rule over foreign territory can be legitimate only if that rule is exercised on behalf of, and for the benefit of, the foreign population".<sup>780</sup> In this domestic sphere, the legitimacy of a UN territorial governance mission thus depends upon its ability to incorporate the views of the people's representatives. Phrased differently, legitimacy in this sphere reflects the extent to which 'imported' institutions and rules resonate with public opinion and the widely shared values within the target community. The reception of such socialisation mechanisms – the extent to which an international organisation actually manages to implement certain ideational standards and normative underpinnings to the community under its tutelage – is crucial. Adversely, organisations that lack acceptable legitimated accounts of their activities are vulnerable to claims that they are negligent and unnecessary.

The manner in which an international administration resorts to arguments legitimising the exercise of *imperium* in an internationalised territory thus depends on the function it is cast in: as territorial agent, an international mission's arguments possess a domestic dimension; as collective organ of the international community, a UN mission is under pressure to justify its plenary administration to an international audience. This follows the main conclusions of Chapter IV in which we described the 'dual roles' of an international territorial administration. We have accordingly termed these two discrete dimensions 'domestic' and 'international' legitimacy, with the former denoting an attribution of the relationship between the international agent and the people temporarily governed by it, and the latter indicating an attribution of the relationship between the international organ and the organised international community.

By discussing legitimacy in both its domestic and international dimensions in dyadic terms, we do not intend to assume a neat separation between the two realms of domestic and international politics. Such a separation is merely an analytical device to contextualise the various claims to legitimate government. As we emphasised earlier, an international administration collapses the conceptual separation between domestic and foreign policy – from a theoretical perspective it *is* the nexus that connects the 'interior' and the 'exterior'.<sup>781</sup> Accordingly, arguments advanced towards one audience reinforce claims made to the other; they occasionally can come into conflict with each other as well. Pragmatic appeals to the local population to sustain more power cuts during a harsh winter may debase lofty claims, made towards the international community, that the funds utilised to stabilise the energy supply have been put to good use. Hollow platitudes regarding the fulfilment of 'standards'

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increasingly assessed in terms of what happens than in terms of traditional criteria that delineate what forms of action are constitutionally or politically appropriate".

<sup>779</sup> This definition of an international territorial administration is drawn from Wilde, 'Danzig', *supra* note 646, at 585.

<sup>780</sup> *New Trusteeship*, *supra* note 13, at 57-58.

<sup>781</sup> Chapter IV, *supra* p.144.



made to the local institutions may signal the shirking of pragmatic exchanges with the international community as to how the UN itself can be subject to good governance benchmarks. On the other hand, a boost in a UN mission's domestic credibility (as witnessed under the leadership of SRSG Jessen-Petersen) facilitates its re-legitimation in the international sphere.

### 6.1.2 PURSUIT OF DOMESTIC LEGITIMACY: TWO PROMISES

An international authority's construction of 'legitimate rule' within the administered entity is of a special quality. An instrumental logic designates it as an agent whose short-term purpose is to solve problems associated with the immediate aftermath of war: enormous social dislocation and human protection. The special position of a trustee administration implies that it cannot draw legitimacy from foundational myths, scientific doctrine, alleged providence or the political will of a nationally constituted *demos*.<sup>782</sup> This is, of course, a sociological triviality. Yet it serves to illustrate the point that an international administration can be supposed to rely on other legitimising strategies that resemble those of national public administrations. In its governorship role, a trustee's ability to generate domestic legitimacy hinges then, firstly, on the effective provision of public goods and, secondly, on their compatibility with prevalent local ideology and cultural background. In the subjectivist rendering, domestic legitimacy rests on the concurrence of policies with citizens' preferences.<sup>783</sup> Beyond traditional considerations of 'output legitimacy', an international administration bases its claim to exercise authority on two argumentative 'pillars'.

#### (1) THE FOUNDATIONAL PROMISE

As a first-order legitimising strategy within an internationalised theatre, the international agent relies on its primary competency to activate the latent subjectivity of the territory. In what we may term the foundational promise of fiduciary administration, the international agent establishes and sustains the identity and status of a particular polity *qua* polity.<sup>784</sup> It lends a temporal political identity to a non-state territorial unit through 'performativity'.<sup>785</sup> In the case of Kosovo, the drafters of the Constitutional Framework pursued such foundational promise by positing that Kosovo would be an undivided territorial unit under interim international administration – an "*entity...which, with its people, has unique historical, legal, cultural and linguistic attributes*".<sup>786</sup> The foundational promise inherent to an institution-building mandate is also visible in its reconstitution of the collective, ideally across divisive ethnic and religious lines.<sup>787</sup> The expectations arising from the constitutional promise of

<sup>782</sup> Adapted from Jens Steffek, 'The Legitimation of International Governance: A Discourse Approach', 9:2 *EJIR* 249-275 (2003), at 271.

<sup>783</sup> Various types of conflicts are imaginable: democratically elected leaders campaign on a platform hostile to minorities; an established judicial machinery offends traditional dispute resolution practices; appeals to ideology and customs undercut effective government associated with modernisation.

<sup>784</sup> This expression is lifted from Neil Walker's approach to sovereignty that involves a discursive claim to ordering the social and political world ('Late Sovereignty in the European Union', in *Sovereignty in Transition* (ed. by N. Walker, Oxford/Portland, Or.: Hart Publishing, 2003), at 6).

<sup>785</sup> Cf. Chapter III.2.2, *supra* p. 111.

<sup>786</sup> UNMIK/REG/2001/9, §1.2 and §1.1, *supra* note 618 (emphasis added).

<sup>787</sup> Cf. Report of the Secretary-General, *No Exit without Strategy: Security Council Decision-Making and the Closure or Transition of United Nations Peacekeeping Operations*, UN Doc. S/2001/394 (20 April 2001), at 2.

temporary protection and institution-building represent the primacy source of UNMIK's domestic legitimacy, which depends on the extent of trust it maintains in pursuing the interests of the thus constituted polity.

The following two examples illustrate these propositions. The exercise of fiduciary functions of UNMIK have been subject to fierce local contestation as the UN responded ambiguously to a 2001 border demarcation agreement, concluded between Belgrade and Skopje, which concerned Kosovo's southern border with Macedonia (fYRoM).<sup>788</sup> One year later, the agreement had severe repercussions on Kosovo's institutional structure. As UNMIK and KFOR continued to state that the agreement was irrelevant,<sup>789</sup> FRY's President addressed a letter to the UNSG in which he stressed that the border accord between the FRY and fYRoM was reached "between two sovereign and independent countries, members of the United Nations" and that it reaffirmed the existing border between the two republics (Serbia and Macedonia) of the former Yugoslavia.<sup>790</sup> This view was eventually also adopted by UNMIK SRSG Steiner who announced that the agreement must be respected.<sup>791</sup> UNMIK's astounding *volte-face* was necessitated by the SC's (erroneous) belief that FRY had the title to dispose of parts of Kosovo territory.<sup>792</sup> This decision had severe consequences for UNMIK's ability to generate domestic legitimacy as it openly demonstrated to the wider public that the administration does not wholeheartedly perform Kosovo's interests on the international stage. It instead became clear that, in its second identity as subsidiary organ of the UN, UNMIK would have to pursue the *Staatengemeinschaftsinteresse*, directing it to respect the territorial integrity of the FRY. These observations serve to highlight that the fiercest challenges to the political legitimacy of an international agent's governorship emerge as the agent is perceived to breach the trust, the cornerstone of the international intervention

<sup>788</sup> The agreement was signed on 23 February 2001 and promulgated by Serbia on 16 June 2001 following its ratification by both countries' parliaments.

<sup>789</sup> The UNMIK Spokesperson noted that "it is not up to us to recognize the Agreement or not. We administer the territory as it was defined by the 1244" (UNMIK Press Briefing Notes, 21 February 2002). This view was initially shared by the new Kosovo PM Rexhepi who (correctly) believed that the agreement did not preserve but change Kosovo's borders, as a territory of 2,500 hectares of pastures claimed by Kosovo residents had fallen under the control of fYRoM border guards.

<sup>790</sup> President Kostunica quoted in Brand, *International Administration*, *supra* note 597, at 143.

<sup>791</sup> The subsequent Resolution by the Kosovo Assembly on the 'Territorial Integrity of Kosovo' was declared void by the SRSG and was strongly condemned by the SC (see *infra* note 904).

<sup>792</sup> Following our earlier suggestions in Chapter 1.1.2 (iii), *supra* p.30, which likened the properties of an internationalised territory to those of an international objective regime with *erga omnes* character, it is more than questionable that SCG was – or is – in a position to exercise aspects of foreign relations with regard to territorial dispositions during the period of its 'protected' status. To recapitulate, we argued that UNMIK's temporary assumption of effective control, from an *in rem* perspective, can be likened to that of the beneficiary of an international servitude. Such servitude is imposed by the international community following considerations of *ordre public*. UNMIK, according to the foundational logic referred to in this section, does not benefit from the servitude itself, but exercises it on behalf of the people under its protection. By signing away land to fYRoM during UNMIK's interim *imperium* over the territory, SCG failed to recognise the United Nations jurisdiction therein. Such interpretation would see both fYRoM and SCG in breach with their obligations under the UN Charter. It is contended that the assumption of UN responsibility over Kosovo precludes any contractual form that fails to recognise UNMIK's jurisdiction. These propositions go hand in hand with our earlier conclusions that UN members states were under a legal obligation to recognise the UN Council for Namibia as sole representative and administrator of the territory. As demonstrated by the hypothetical scenario in the previous chapter, SCG can indeed exercise its right to dispose of the territory by virtue of its bare title *qua* titular sovereignty, for the benefit of another state. The recipient state must, however, accept UNMIK's jurisdiction as a limitation to its exercise of effective control in accordance with Resolution 1244. This follows from Art. 103 of the UN Charter.

project.

On the flipside, domestic legitimacy can be bolstered by active performance of the fiduciary bond under which UNMIK acts as territorial government in the interests of the entity under its temporary protection. One such example involves the provisional release of former Prime Minister *Haradinaj* from the custody of the ICTY after protracted proceedings, upon decision of the Trial Chamber in June 2005.<sup>793</sup> UNMIK, in a confidential written submission and during the course of oral pleadings before the Chamber, decided to offer guarantees to the ICTY that it was in a position to secure the arrest of the Accused, should he violate the terms of his provisional release. UNMIK was ordered, in the operative part of the decision on release, to take custody of the accused, and the Trial Chamber did note that "the fact that the Accused's former position as Prime Minister implicates that guarantees would carry less weight were they to be provided by his government, whereas the situation in this case fundamentally differs in that UNMIK is an international agency headed by the United Nations". Strengthening its domestic legitimacy by that same token, UNMIK fulfilled the duties stemming from the performance of its fiduciary bond vis-à-vis the territory.

Several ancillary arguments flow from these postulates. International and local institutions, tied to each other by an institution-building mandate, share a commitment to the long-term interest of the population. Their internal relations are necessary in a sense that both international agent and emergent local institutions depend upon the performance of this relationship: in a trustee-ward relationship, neither entity is conceivable without the other.<sup>794</sup> The ward would be without representation, hence unable to access the international legal space, whereas the trustee would cease to be a trustee were it to sever its relationship with the ward. As this necessary relationship between two actors is built, each entity relies on a distinct set of criteria to legitimise the exercise of public power.

## (II) DEVOLUTION OF POWER AND THE DEMOCRATIC MOMENT

*'We pledge to first raise the living standards of Bosnia-Herzegovina; then to concentrate on education; and finally to turn to political self-government'*<sup>795</sup>

An international agent's governmental decisions will be empirically accepted to the degree that its 'foreign rule' is perceived to set in motion constitutional processes that fill the initial administrative vacuum and later shape the political structure's transition while nurturing participation. International rule exercised within such territory will be deemed legitimate to the extent that local institutions are able to participate in policy-making. The holding of

<sup>793</sup> *Decision on Ramush Haradinaj's Motion for Provisional Release*, Case No. It-04-84-Pt, Trial Chamber II (6 June 2005), at 5: "the legitimate authority and administration of Kosovo, UNMIK, has agreed to provide the necessary guarantees to ensure compliance with any conditions the Trial Chamber may impose if the Accused is provisionally released". In any case, UNMIK's guarantee represents a curious case in which one subsidiary organ of the UN exercises quasi-consular activities towards another. The background to the Haradinaj indictment is presented in ICG, *Haradinaj*, supra note 746, at 2-3.

<sup>794</sup> Adapted from Wendt, 'Agent-Structure Problem', supra note 754, at 346.

<sup>795</sup> Austrian Foreign Minister Count Andrassy, making the case for the occupation of Bosnia to the Congress of Berlin in 1878, quoted in: European Stability Initiative, *Governance and Democracy in Bosnia and Herzegovina. Post-Industrial Society and the Authoritarian Temptation* (Berlin, 2004), at 8.

elections is precisely the means to increase the sense of participation and ownership and to bring the broad public into its proper position of authority.<sup>796</sup> Domestic legitimacy will, in the medium term, be defined as a property of international governance that is measured, firstly, by the extent to which it creates a thick weave of enabling structures to set local institutions on a sustainable path, and secondly, by the degree and pace it devolves authority in a sequence of instituted transfer to local actors under a 'participatory model'.<sup>797</sup>

Hence, the second strategy in pursuit of domestic legitimacy builds upon an international administrations promise to transfer competences to local stakeholders in order to vest them with a sense of ownership. The democratisation of a polity administered by the international community serves not only as an organisational arrangement vesting local institutions with the power of legitimacy, but also as a legitimisation principle to which the international organ has recourse. As *Chesterman* suggests, the transfer of power to the legitimate and sustainable local authority, typically mediated through an election, is the central purpose of any transitional administration.<sup>798</sup> Conceived as a procedure facilitating the transfer of legitimacy from international to local actors, the international agent's reliance on democratic reform is a second-order argument. Its normative essence emphasises the 'constitutionalisation' – i.e., the entrenchment within the municipal constitutional order – of the position of local political institutions which, reaping the benefits of popular sovereignty, operate within the terms set for reaching legitimate decisions. The international agent enters into a power-sharing agreement with the local institutions precisely with a view to establishing the latter's functional limitations to the legitimate exercise of local administration and governance. According to this second-order legitimising strategy, the international agent itself has brought about the institutions whose legitimacy it has not only assisted to activate but indeed created: "The more powers conferred on local representatives, the closer power is to the people and thus the more legitimate the nature of the administration".<sup>799</sup> As a corollary, the democratic moment endows the local agent with confidence to represent the perspectives of the new political collective. The emerging self-confidence can be well demonstrated by pointing at the ongoing discussions about the transfer of competencies from the international administration to local institutions in Kosovo. In a conversation with the former Principal Deputy SRSG *Brayshaw*, the Speaker of the Kosovo Assembly, *Daci*, is reported to have said:

UNMIK cannot set the priorities for the Kosovo Assembly. The MPs are responsible before their electorate and they know what their priorities are.<sup>800</sup>

This is an interesting claim. While the language of law and accountability, introduced by the international agent, imbues the local institutions with legitimacy and authority, the latter relies

<sup>796</sup> Cf. Feldman, *Iraq*, *supra* note 22, at 98.

<sup>797</sup> For a similar argument see Henry H. Perritt, 'Final Status for Kosovo', 80 *Chicago-Kent LR* 3-27 (2005), at 10-11. As Beauvais notes, the shift from the factional representation in East Timor's National Consultative Council to the expanded representation in the East Timorese National Council led to a considerable increase in the legitimacy of UNTAET. As a corollary, the more limited the scope of participation in relation to the actual political and civil society spectrum, the more limited the degree of legitimacy the co-government mechanism will confer ('Benevolent Despotism', *supra* note 774, at 1129-1134).

<sup>798</sup> *You, the People*, *supra* note 14, at 223 *et seq.*

<sup>799</sup> UNTAET SRSG Sergio Vieira de Mello, 'How Not to Run a Country': Lessons for the UN from Kosovo and East Timor' (unpublished manuscript, 2000), at 4

<sup>800</sup> *Koha Ditore*, 16 June 2004.

on the criterion of popular legitimacy in order to challenge international tutelage.

### **6.1.3 INSTITUTIONAL CONTESTATION AND THE EROSION OF POLITICAL AUTHORITY**

The texture of legitimacy is, in this reading, fungible, and its transfer under an asymmetrical 'dual-key' constitutional arrangement can be accompanied by a struggle to appropriate powers in accordance with different sets of interests pursued by international and local actors. While a local institution wielding a measure of political authority will initially pursue a strategy of building domestic legitimacy (including developing mechanisms for aggregating interests, organising political agendas, etc), the challenge for an international institution-building mission consists in ensuring that international and local institutional activity do not compete for legitimacy at the expense of the other.

In 'open-ended' status situations, in which the international administration claims to have created the conditions under which the conduct of free and fair elections and the ensuing establishment of local institutions takes place, a curious phenomenon can be observed. It relates to the utilisation of the second-order argument the international agent makes in order to resist the rapid transfer of competencies. On the one hand, the argument appears plausible: after all, the international agent is mandated to first bolster the democratic credentials of such local institutions and increase the capacity of a troubled society to act collectively before it devolves powers to it. Gradually, however, the international administrations' claim to hold on to the exercise of power becomes less plausible the more stable, representative, and effective the local agent becomes. The tactic line of defence the international agent will choose to employ in order to oppose the further transfer of competencies to local actors will sound increasingly hollow and self-defeating as the local political institutions assert their democratic credentials and rely upon the legitimising criterion of popular elections. In such a scenario (which is lifted from the ongoing battle between respective spheres of competency between the PISG and UNMIK), the internal power sharing agreement itself is prone unravelling and likely to be contested.

From what can be gleaned from the past six years of international institution-building in Kosovo, local institutions have effectively drawn upon such weaknesses and built effective methods of resisting international authority. At times, their elected leaders have borrowed from the rational-legal language of the international administration and argued that, in the discharge of UNMIK's remaining powers, it would not be true to its professed values. Local institutions have mounted increasing challenges that are primarily framed in the aspirational idiom of Western constitutionalism. A key instance in which an attentive observer of Kosovo's domestic politics would conclude that a process of institutional contestation of legitimacy was well under way occurred in July 2004. The veritable governance crisis following the tumultuous events of the March 2004 riots reinforced efforts to redefine the principal government structure. In October 2003, the Kosovo Assembly had endorsed an initiative to establish a working group charged with proposing amendments to the Constitutional Framework (CF). It met several times throughout the following months, and eventually rejected an offer from UNMIK to form a joint working group in order to identify

amendable provisions.<sup>801</sup> The Working Group's proposal<sup>802</sup> was approved by the Kosovo Assembly endorsing amendments to the CF that would, among other infringements of Resolution 1244, also have negatively affected the interests of minority communities. While UNMIK concluded that a "comprehensive review of the Constitutional Framework is outside the competence of the Assembly",<sup>803</sup> an OSCE Report explained more sensibly that

such a seemingly illogical and desperate initiative may reveal the depth of frustration within the PISG due to the perceived slow rate of transfer of powers to local institutions and the unresolved status of Kosovo. Supporters of the initiative expected that either UNMIK would ultimately make some concessions, or, more likely, it would appear stiff and bureaucratic, the PISG thereby having won a "moral victory" in the eyes of the public, at UNMIK's expense.<sup>804</sup>

Another report by this component UNMIK-pillar even surmised that

UNMIK's strategy in responding to this challenge to its own authority and that of the UN has been low-key but should it be deemed necessary, DPKO and ultimately the UN Security Council can be asked to make a pronouncement on the issue. The SRSG is in a strong position vis-à-vis the Assembly as he retains the final decision-making authority in this matter and may selectively approve amendments proposed by the Assembly or reject the entire package.<sup>805</sup>

In this instance, a local institution, confident that it would be in a position to take over new competencies from the international administration, intended to de-legitimise the international agent's reliance on its legitimate claim to the continued exercise of effective control in key areas, accusing it of implementing 'foreign rule' that would be increasingly alienated from the interests and opinions of the 'people' that it, the local agent, represents as a structured social group.

#### (i) THE TWO FRONTS OF THE STRUGGLE OVER DOMESTIC LEGITIMACY

The progressive erosion of an international mission's authority can hence be explained in the following way: the internal legitimacy of an international agent – the extent to which its rule is

<sup>801</sup> For the background to the amendment process cf. OSCE Mission in Kosovo, *Spot Report: On the Monitoring of the Assembly of Kosovo* (7 July 2004), as well as the Mission's *Background Report: On the Assembly's Proposal of Amendments to the Constitutional Framework* (12 July 2004).

<sup>802</sup> Working Group on Preparing Proposals to Amend and Complete the Constitutional Framework, *Proposal of Amendments and Supplements to the Constitutional Framework*, 24 May 2004. The proposed amendments foresaw new competencies for the PISG in a number of areas including international relations, public security, justice and judicial review, energy, and local government. The Kosovo Protection Corps – the infant army – would have been placed under the authority of local institutions. Extensive changes to the right to hold referenda on issues of "particular importance to the people of Kosovo" were proposed as well, all of which would have encroached upon UNMIK's reserved competencies. The draft 44 amendments for changes to the CF were printed in the daily *Zëri* (27 May 2004), at 1 and 4-5.

<sup>803</sup> UNMIK Press Release, *UNMIK's Statement on Today's Session of the Kosovo Assembly*, UNMIK/PR/1202 (8 July 2004). DSRSG Brayshaw was quoted as saying that "at present there can be no substantial changes, especially not in the reserved powers" and that "constitutional changes are not a priority for Kosovo" (*Koha Ditore*, 16 June 2004, at 3).

<sup>804</sup> Cf. OSCE Mission in Kosovo (OMIK), *Spot Report: On the Monitoring of the Assembly of Kosovo* (7 July 2004), at 3.

<sup>805</sup> OMIK, *Spot Report on the Assembly of Kosovo's Adoption of Proposed Amendments to the Constitutional Framework* (13 July 2004), at 2.

accepted as just and worthy of recognition<sup>806</sup> – decreases as the local actor refuses to comply with a rule that it perceives as contradicting its aggregate 'interests'. An international agent's domestic legitimacy weakens the more its rule is perceived to gradually undermine the realisation of self-government, and the less it is perceived to create the conditions under which self-government can be exercised. Following the subjectivist account of legitimacy presented in the introduction of this chapter, de-legitimisation can be understood as a process of gradually weakening the capacity of a system to engender and maintain the belief that the existing political institutions are the most appropriate ones for a particular society.<sup>807</sup>

The substantive struggle between local institutions and its international 'guardians' takes place on two cognitive fronts. On the one side, local institutions perceive it as a conflict over the *degree* of local participation (devolution). In the minds of international officials, the conflict looms over the *quality* of local participation (standards). On this second front, local institutions will find further grounds for disclaiming the authority and legitimacy of an international agent as the latter endeavours to evaluate the former's governance performance against a set of 'benchmarks' without making the performance of its own governance apparatus subject to any scrutiny whatsoever.<sup>808</sup> The international agent, convinced that the local political institutions are not yet ready to meet the standards they are charged to implement, will tend to de-legitimise the latter in the eyes of the 'people' who have chosen them. By portraying the local agent as, i.e., overly corrupt and incapable of conforming to the standard set for local self-government, an international authority communicates that the institutional resources for democratic authorisation are lacking.

In the process, the international agent will, however, contribute to the de-legitimisation of its own claim to legitimate rule for, as we have demonstrated, it also relies on the second-order argument of democratic institution-building. Well into the institution building exercise and the 'civilising mission' it is bound to pursue, UNMIK (as well as the OHR) tended to increase its vigilance as to popular aspects of legitimacy and fell back upon more coercive means. Both in Kosovo and Bosnia, the international administrations were accordingly inclined to 'perennialise' their stronghold over 'reserved competencies'. They have done so by putting forth, and defending, the argument that they deem that the conditions for the proper exercise of effective control by the local agents are not met at a given point in time. This argument is incoherent to the extent that it verges on self-invalidation. It not only impacts on the 'popular' dimension of legitimacy in a sense that it further enrages attitudes and weakens an international agent's capacity to attract domestic approval. More worryingly, it undermines the congruence of a system of power and its justification and hence the normative foundation of legitimate rule itself. The very purpose of the initial concentration of plenary authority within the international institutions, it must be recalled, is precisely the mobilisation of institutional resources for democratic authorisation for government and the rapid establishment of a local architecture that is capable of assuming competencies in a sequence of projected transfer. Unless a derogation from the participatory paradigm might be temporarily necessary to manage emergencies, the maintenance of, or reversion to, the

<sup>806</sup> Cf. Jürgen Habermas, *Communication and the Evolution of Society* (McCarthy trans., 1978), 178.

<sup>807</sup> Cf. Seymour M. Lipset, 'Social Conflict, Legitimacy, and Democracy', in *Legitimacy and the State* (ed. by W. Conolly, New York: NYU Press, 1984), at 88.

<sup>808</sup> The 'benchmarking' process as policy instrument to advance the determination of an entity's final status was discussed in Chapter V.1.2 (ii), *supra*, p. 163.

coercive model will be perceived as nothing but a contradiction to the initial mandate.

## (II) NEGATIVE EXTERNALITIES

These processes of reciprocal de-legitimisation between the international agent and local actors not only impose heavy additional enforcement costs on the controllers. They cause confusion on the part of a population over which institution, if any, is the right one to make authoritative declarations and may also lead to the effective diffusion of what Raz termed 'normative power'.<sup>809</sup> Where the realisation of legitimate domestic political order in one jurisdiction threatens its realisation in others, conflict is more likely. Facilitated by conditions that widen the cleavage of 'interests' among international and local actors, the contestation of legitimacy results in negative externalities in that such a process threatens to derail the institution-building sequence. As a consequence, the international agent is more likely to be tempted to abandon a 'consent-based' dual-key model of authority that has placed the local institutions in a partnership role. It might adopt a coercive model which permits it to regain centralised control in order to make rapid decisions and to reduce the disruptions that it perceives to be caused by local actors.<sup>810</sup> By basing its authority more and more on 'international legitimacy' and the pursuit of the 'international community interest', an international territorial administration perennialises its position into what some authors have termed 'enlightened despotism' and formulates policies that are not perceived as providing gains for society as a whole.

At its best, such a return to centralised control that effectively rolls back the process through which local stakeholders have gained a voice in decision-making helps to minimise the short-term risk of open political conflict.<sup>811</sup> However, the effective reversal of building local 'ownership' can, in the medium term, undermine the capacity of local institutions to develop legitimate mechanisms to resolve internal conflict.<sup>812</sup> As a result of this dialectic relationship whereby the responsibility ascribed to one actor is undermined by the responsibility ascribed to another,<sup>813</sup> an experiment in international political authority may lose the support of those subject to its norms. While it is commonplace to argue that uncertainty breeds instability, one of the conclusions here is that the international community will indeed have to assume a degree of responsibility for setting in motion a destabilising political dynamic that renders the power-sharing agreement in Kosovo subject to local contestation. On the security side, it has proven to be extremely difficult to call on reluctant players of the prospective democratic (and multi-ethnic) game to renounce alternatives. The challenge for an interim administration has therefore been to compel them to work within uncertain parameters and to build a

<sup>809</sup> Joseph Raz, *The Authority of Law. Essays on Law and Morality* (Oxford: Clarendon Press, 1979), at 16 *et seq.*

<sup>810</sup> As Paddy Ashdown, the BiH High Representative, remarked: "If spending limits are about to be breached, or a Standby Agreement about to fall, we tend to intervene, the problem disappears and life goes on. So, the symptoms are relieved, the immediate crisis averted; but too often the chronic disease remains unaffected" (Speech at the Launch of the UNDP Governance Perception Survey, Sarajevo, 9 June 2003).

<sup>811</sup> Cf. Beauvais, 'Benevolent Despotism', *supra* note 774, at 1116.

<sup>812</sup> See Knaus/Martin, 'Raj', *supra* note 8. For a definition of 'self-enforcing peace' as a policy objective for peace-building see Elisabeth M. Cousens, 'Introduction', in *Peacebuilding as Politics: The Cultivation of Peace in Fragile Societies* (ed. by E.M. Cousens and C. Kumar, London: Lynne Rienner, 2001), 1-20.

<sup>813</sup> Ralph Wilde 'The Complex Role of the Legal Adviser When International Organizations Administer Territory', 95 *ASIL Proceedings* 251-261 (2001), at 256.



presumptive legitimacy.<sup>814</sup> This challenge has been met only to a certain extent. Moreover, the dismal economic situation in Kosovo after six years of international administration, and its documented failure to quickly address its roots is equally illustrative of a system of power which became chronically unable to meet the interests of the people under its tutelage. At its most grim, the international administrative presence in Kosovo may face local upheaval as anxiety about the 'future status' mounts and as the power-sharing agreement with the local institutions unravels.

#### RÉSUMÉ

Entropy is a persistent feature of social life and few institutions can safely ignore the task of legitimacy maintenance. This is especially significant in a temporarily internationalised territory in which the notion of legitimate authority is constantly contested between international agent and emergent local actors. It is a commonly held wisdom that the success of any strategy for Kosovo's future will very much depend on the confidence and satisfaction of the population with the relevant international and domestic institutions. Recent surveys indicate a trend of decreasing satisfaction with the performance of institutions.<sup>815</sup> There are several theoretical and policy implications that flow from an analysis that seeks to study the impact of structures and processes upon normative change. Processes of erosion of political authority are more likely to occur in an 'open-ended' institution-building setting in which a multi-dimensional peacekeeping force acting as trustee also assumes tasks going beyond that of a traditional fiduciary bond, such as participation in the determination of the 'final status' of its ward. Second, and tragically so, an international presence might have to revise the scheduling of the timing and extent to which authority is devolved to local actors.

In his analysis of institution-building in East Timor, *Beauvais* demonstrates that an international mission's mandate can be broken down into two distinct aspects, which he terms 'UN governorship' mandate and a 'local self government' mandate. While conceptually compatible, he writes in his concise study on UNTAET's activities, "in practice these two mandates are in deep tension with one another, particularly with respect to control over decision-making and allocation of resources".<sup>816</sup> The consolidation of UN governorship is predicated on the establishment and maintenance of centralised international control over decision-making; the 'participatory governance' model, on the other hand, places a premium on broadly sharing of power with local stakeholders. As another author put it, an international administration is functioning as "both state and state builder".<sup>817</sup> We concurred with this perspective and noted that the pursuit of different sets of interest by the international agent

<sup>814</sup> Cf. Giuseppe di Palma, *To Craft Democracies. An Essay on Democratic Transitions* (Berkeley, CA: University of California Press, 1990), at 31.

<sup>815</sup> The past two years saw a rapid decline of local satisfaction with UNMIK's performance (from 51.9% in January/March 2003 to 20.7% in May/August 2004) and the SRSG's performance (from 71.4% in May/August 2003 to 32.4% in January/April 2004), while the level of satisfaction with local institutions (executive branch) remained approximately equal (from 74.9% in January/March 2003 to 71.9% in May/August 2004). Cf. Riinvest/UNDP, *Early Warning System Project, Kosovo Report No. 6 (January-April 2004)* and *7 (May-August 2004)*. One of the key issues related to the fall of credibility of international institutions is a perception that they are not effective enough in the sphere of law enforcement. Satisfaction with the SRSG's performance has, however, sharply increased to over 80% after Jessen-Petersen assumed the position (June 2005, cf. *Report No. 10 (May-August 2005)*).

<sup>816</sup> 'Benevolent Despotism', *supra* note 774, at 1108.

<sup>817</sup> James Cotton, 'Against the Grain: The East Timor Intervention', 43 *Survival* 127 (2001), at 139.

and the local political institutions created under the 'foundational' dimension of the institution-building mandate may place those two institutions in opposition to each other. International agent and local institutions derive the legitimacy to exercise public power from different sources and work to satisfy different 'constituencies'. While the international agent relies on a dual set of arguments legitimising its authority, local institutions rely on the mandate of the electorate to the same extent that they base their claim to legitimate authority on the *telos* of the participatory model the international agent promises to implement. In Kosovo, those tensions came to the fore in the course of drafting the Constitutional Framework which put UNMIK in the odd position of having to resist Kosovo-Albanian attempts to include references to the 'will of the people'.<sup>818</sup>

However, it is at this point important to remind ourselves that the hypothesis that pursuing either of these objectives *necessarily* undermines the other, is tenuous.<sup>819</sup> Phenomena of reciprocal de-legitimisation of public authority are not path-dependent. They do not occur as a by-line of the methodology of internationalisation of territory, as can be easily shown by the overlapping, mostly simultaneous and mutually reinforcing activities of the UN Council for Namibia and the South West Africa People's Organisation (SWAPO) as 'sole and authentic' representative of the Namibian people' during the 1970's.<sup>820</sup> Post-conflict international administrations, like occupation administrations, do not get to choose between these two functions. Rather, their reconciliation and integration and the management of the anomalous legitimacy cycle should be seen as the primary *problématique* of state building under international tutelage.

To summarise, the exercise of dual functions by an international administration yields negative externalities only when it is charged with pursuing objectives *perceived to be in possible contradiction* with each other. By exposing the inherent constraints faced by an international agent, our analysis should help policymakers understand why such challenges to political authority arise. Under the constraints imposed by an 'open-ended' deployment mandate, in which the final status of a UN-administered territory remains contested, we should be able to predict negative externalities in the form of a gradual erosion of political authority. In such a setting, the essence of the democratic method – the regulation of uncertainty of outcomes through participatory means – is diluted. The 'crisis of legitimacy' in an internationalised territory – understood as the loss of public confidence and the concomitant loss of normative power held by institutions – should ideally prompt the United Nations to search for solutions that bridge the gap between normative ideal and observable reality. Yet, as a response to the challenges mounted against it, an international agent tends to reverse

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<sup>818</sup> Cf. the preamble of the provisional draft of the CF of 17 April 2001, quoted by Chesterman, *You, the People*, *supra* note 14, at 228. According to established UN practice, an inclusion of the 'will of the people' in its foundational promise would have implied the holding of a referendum under international supervision. In its promulgated version, the CF's Preamble provides that the process to determine Kosovo's future status "shall...take full account of all relevant factors including the will of the people". In spring 2001, local outrage and frustration at the idea that the importance of other 'relevant factors' (international legal concerns? regional security interests? doubts about Kosovo's economic viability?) could outweigh arguments mobilised in support of self-determination by referendum were palpable.

<sup>819</sup> Ralph Wilde, 'The Ambivalent Mandates of International Organisations in Bosnia-Herzegovina, Kosovo and East Timor', *Australian and New Zealand SIL Proceedings of the Joint Meeting with the ASIL* (2000), at 319.

<sup>820</sup> *Supra*, note 326.

the political trajectory towards self-governance and 'perennialise' its stronghold over key government competencies, making itself a target of local outrage and further processes of de-legitimisation that directly impact upon its performance.

As Weber noted, "the basis of every authority, and correspondingly of every kind of willingness to obey, is a belief, a belief by virtue of which persons exercising authority are lent prestige".<sup>821</sup> His observation that the stability and effectiveness of a political order of domination depends on its recognition as legitimate is equally applicable to an institution-building environment. As territorial government, the UN must realise that prestige of its rule emerges only to the extent that its governmental output is compatible with the value patterns of the societies under its tutelage. To maintain its domestic legitimacy, an administration that assumes the governance of territory for an undefined time cannot merely be the handiwork of a diplomatic leadership, but must also resonate deeply with the inhabitants under its guardianship. The notion of trusteeship will escape its imperial past only if an international agent publicly engages with local institutions and represents the interests of the territory in good faith. Legitimacy, as Beetham correctly notes, requires the demonstration of a common interest which unites dominant and subordinate.<sup>822</sup> Since an international territorial authority cannot have recourse to the normative power of divine will, tradition, scientific doctrine, or a plebiscite mandate, the continuation of legitimate rule within the territory is predicated upon its ability to exercise power on behalf, and in the interest, of the polity it transitionally administers. In that sense, considerations of legitimacy are crucial: the UN must rely on a 'participatory' model – on the co-operation of the wider public in effectuating its purposes.<sup>823</sup>

Incidentally, these propositions could not be further from the ones contained in the 2003 *Handbook on UN Multidimensional Peacekeeping Operations* which reminds SRSGs to "be sensitive to any identification with partisan positions".<sup>824</sup> Applying the terminology so far employed, the *Handbook* clearly prioritises the pursuit of the *Staatengemeinschaftsinteresse* over the territorial interest. One consideration that underlies these conclusions is therefore whether the United Nations is really uniquely positioned to assume the role of interim government, given that UN DPKO's top management priority – namely to ensure that a state-building project is conceptualised as a peace-keeping operation with a strong emphasis on UN governorship through the SRSG – is at odds with an international mission's demand for legitimacy on the local level.<sup>825</sup> The institutional treatment of complex governance missions as peacekeeping operations with a civilian governance function attached does, as correctly identified in the *Brahimi Report*, raise the question of "whether the United Nations should be in this business all", and if yes, which body should be charged with the transitional

<sup>821</sup> Weber, *Economy and Society*, vol. 1, *supra* note 765, at 263.

<sup>822</sup> Beetham, *Legitimation*, *supra* note 750, at 59.

<sup>823</sup> For a similar conclusion – namely, that "any kind of international administration must increasingly seek political participation of the local populations" – cf. Bothe/Maraun, 'UN Administration', *supra* note 601, at 239.

<sup>824</sup> *Supra* note 513, at 21.

<sup>825</sup> Salamun suggests (somewhat originally) that the appointment of an SRSG shall be conducted through a 'co-decision procedure' of the Security Council and the local legislature which would preliminarily rank the candidates (*Democratic Governance*, *supra* note 610, at 222). Such a view however lacks a legal basis in the UN Charter and is predicated on the existence of functioning local institutions (which is regularly not the case in an environment which requires the intervention of the international community).

administration of territories.<sup>826</sup>

So far, this chapter has stressed that the struggle over the conferral or denial of legitimacy takes place within the context of the transfer of public authority from international to local institutions. We have described an institutional dynamic that breeds conflicts over the appropriation of political capital and have generally referred to such an environment as *political* transitionality. Continuing the strands of discussion thus laid out, the next section will focus on an international administration's capacity to engender normative change in order to affect the belief system upon which legitimacy is said to be founded. This is necessary as we have approached legitimacy in terms of political assessment but have neglected normative points of convergence on which it might be possible to appraise the legitimacy of a particular institution or action in terms of their 'lawfulness'. Following an understanding of the concept of legitimacy which we hold to be posited at the intersection of norms and their perception, the following exposé complements the 'perspectival' view with a more rule-based approach.

Indeed, a given power relationship is not merely legitimate because people acquiesce in assertions of authority (surely, normative perceptions can be subject to manipulation if treated as empirical 'feelings'), but because it can be justified *in terms of* their beliefs.<sup>827</sup> Inter-subjectively held value patterns and normative expectations feed our conceptions of constitutionalism and the rule of law which may provide the justification for power. These justifications in turn depend on beliefs current in a given society about what is the rightful source of authority. Our aim in the next section is thus to sketch out certain characteristics of a transitional legal order under conditions of internationalisation.

## 6.2 THE PROPERTIES OF A TRANSITORY LEGAL ORDER

*'The struggle to bring kings and presidents...within the confines of the fundamental laws... has left too indelible an impression upon too many peoples to make plausible any supposition that the founders of the United Nations intended to create, or have created, an organization free of its own basic principles.'*<sup>828</sup>

*'No democratic state operating under the rule of law accords itself total immunity from any administrative, civil or criminal responsibility.'*<sup>829</sup>

The first part of this section explores the intersection of international and municipal law<sup>830</sup> in

<sup>826</sup> *Supra* note 33, at §78. The discussion of whether a revived UN Trusteeship Council should assume temporary tasks will be briefly taken up in the concluding appraisal of this thesis.

<sup>827</sup> Cf. Beetham, *Legitimation*, *supra* note 750, at 11. For a powerful assault on the Weberian approach to legitimacy and Franck's 'fairness' as deeply ideological, indeterminate and complacent evocations of controversial theories of justice, see Martti Koskenniemi, 'Legitimacy, Rights and Ideology: Notes Towards a Critique of the New Moral Internationalism', 7:2 *Associations* 349-373 (2003), at 361-364.

<sup>828</sup> Myres McDougal, Harold Lasswell and Chen, Lung-chu, *Human Rights and World Public Order. The Basic Policies of an International Law of Human Dignity* (New Haven/London: Yale UP, 1980), at 332.

<sup>829</sup> Kosovo Ombudsperson Institution, *Special Report No. 1*, *supra* note 608, at §23.

<sup>830</sup> The term 'municipal' law is usually employed to refer to the domestic law of a particular nation-state, hence contrasting it with 'international' law. In this section, the terms 'municipal' and 'domestic law' will be used to refer to the internal legal order of the 'internationalised territory' of Kosovo.

which an international territorial administration regulates the transition of societies through the dissemination of beliefs and practices and their institutionalisation via models of international-yet-territorial governance. We propose that international norms and practices do not merely provide a value-free framework for multilateral intervention in the socio-economic structure of an entity. More concretely, we argue that the establishment of an international administrative regime, designed by law, is meant to effectuate a normative shift in the very principles underlying and legitimising the exercise of state power and to assist in the transformation of social relationships and structures. The path to liberal-democratic order is, according to this transitional setting, carved out by legal practices against the background of transitional constitutionalism and historical patterns of oppression and discrimination.<sup>831</sup> The second and third sections are concerned with the broader issues of the 'legality' of an international administration's acts. The main argument relates to the 'messiness' of constitutional arrangements in an interim period in which our expectations of an emerging *Rechtsstaat* under international tutelage (that include institutions of norm control) appear compromised.

#### (I) INTRODUCTION: THE TRANSITIONALITY FRAME

Before moving into forward gear in the treatment of the matter, two points of clarification regarding the term 'transitionality' are in order. We have so far described the institutional environment under an international regime of one of political transitionality in which public authority is gradually devolved from international to local actors. In what follows, the term is employed as a heuristic tool to assist in understanding the *specific functions* law has to perform. The next section is built around the proposition that the incorporation of international legislation in a conflict-torn theatre is meant to spearhead this transition and to affect the construction of political change in a 'bounded' period spanning two regimes.<sup>832</sup> To the extent that we can describe the peculiar 'curvature' of a *Rechtsraum* within an internationalised territory and conceptualise the role of international and municipal law in these anomalous situations, we might be able to develop the analytical tools necessary to approach the phenomenon of an internationally managed territory as an *interregnum* between two types of regimes, in which an illiberal repressive past is to be reconciled with a future liberal democratic order.

Secondly, the term 'transitionality' as used in this section refers to the temporally *limited sphere of validity* of a particular legal order – in our case the legal order created by UNMIK which since summer 1999 has exercised effective control over (parts of) the territory. This transitional legal order will cease to be valid with the departure of the United Nations following either Kosovo's re-integration into Serbia's territorial legal order, or the creation of an autonomous legal order.<sup>833</sup> Re-positioning the underlying 'sovereignty' issue of an internationalised territory in terms of the 'birth' and 'death' of a legal order allows us to examine its properties during its 'lifetime'. The temporally limited validity of the UN's legal order and the uncertainty over whether Kosovars will be permitted to freely determine their political

<sup>831</sup> Parts of this section are forthcoming as 'Beyond the "Mission Civilisatrice": The Properties of a Normative Order Within an Internationalised Territory', *LJIL* (January 2006).

<sup>832</sup> Cf. Ruti G. Teitel's intriguing study focusing on regime change in South Africa, Eastern Europe and Latin America, *Transitional Justice* (Oxford University Press, 2000), esp. at 220.

<sup>833</sup> For a discussion of the ambivalence of UNMIK's open-ended institution-building mandate cf. Chapter V.1.2, *supra*, p. 160.

future also furthers our understanding as to why the current normative set-up provides for the continuing partial applicability of the Federal Republic of Yugoslavia's (FRY) and Serbian legislation.

Theorising about the operation of law in an internationalised territory involves at least three discrete dimensions, according to which the present section is structured. First, liberal legal forms are transmitted without being subject to mediation by a 'sovereign'. The diffusion of imported norms represents the precise *telos* of a *mission civilisatrice* of a post-colonial institution-building mission at the periphery of the international system. Such internationalisation projects realise their liberalising potential through a complex process where they provide *legal continuity* while importing legal forms that emphasise discontinuity and progress. In the second dimension, we account for the asymmetric co-government setting exhibited in Kosovo in which law is both municipal and international. The syncretic nature of legal sources limits our attempts to establish a 'hierarchy' of norms in an internationalised territory. Further, the promised advent of a liberal future will be challenged by what we identify as the third characteristic of such transitory legal order – the unaccountability of the international administering agent. Upon consideration, the three properties of a normative order entail a paradox in which the aspirations of a fiduciary administration operating in the slipstream of liberal internationalism and its 'civilising mission' are qualified by the absence of key criteria of a *Rechtsstaat* – the democratic creation of laws, the separation of powers, legal certainty and the judicial control of normative acts.

## 6.2.1 THE UNMEDIATED IMPORT OF INTERNATIONAL LAW

*'What law applies in countries that do not yet exist?'*<sup>834</sup>

By vesting the SRSG with '[a]ll legislative and executive authority with respect to Kosovo',<sup>835</sup> the UN Security Council partially derogated the FRY's normative order within the territory.<sup>836</sup> Owing to its basis in Chapter VII of the UN Charter, Resolution 1244 'vertically opened' Kosovo's normative space. In the wake of UNMIK's deployment in summer 1999, the already complex questions surrounding the operation of the Emergency Judicial System<sup>837</sup> were, however, compounded by what a commentator called "a major course correction on

<sup>834</sup> Vieira de Mello, 'Lessons', *supra* note 799.

<sup>835</sup> UNMIK/REG/1999/1, *supra* note 598, s.1(1).

<sup>836</sup> FRY's legal order was not derogated because of the FRY's 'approval' to UNMIK's deployment expressed in the Annex 1 of Resolution 1244, as argued by Stahn ('Transitional Administrations', *supra* note 604, at 146). For a discussion see Knoll, 'UN Imperium', *supra* note 36, at 26. The term 'derogation' is used in the sense as Kelsen developed it: "the repeal of the validity of an already valid norm by another norm" (*General Theory of Norms* (transl. by M. Hartney, Oxford: Clarendon Press, 1991), at 106).

<sup>837</sup> See *Report of the Secretary-General of 23 December 1999*, *supra* note 627, §§54-60, 70-78. For three accounts of UNMIK's approach to reinstall the judicial system see David Marshall and Shelley Inglis, 'The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo', 16 *Harvard HRJ* 95-146 (2003), 100-102; William G. O'Neill, 'Kosovo: Unexpected Barriers to Building Peace and Security', in *Honoring Human Rights Under International Mandates: Lessons from Bosnia, Kosovo, and East Timor* (The Aspen Institute: Washington, D.C., 2003), at 87; and Strohmeyer, 'Collapse', *supra* note 33. For a critique of UNMIK's failure to address the lawmaking process quickly and introducing priorities, cf. Wendy S. Betts et al., 'The Post-Conflict Transitional Administration of Kosovo and the Lessons-Learned in Efforts to Establish a Judiciary and Rule of Law', 22 *Michigan JIL* 371-389 (2001), at 382, and Anthony J. Miller, 'UNMIK: Lessons Learned from the Early Institution-Building Phase', 39 *New England LR* 9-24 (2004), at 16 *et seq.*

the most fundamental legal question in Kosovo".<sup>838</sup> Crumbling under the recalcitrance of Kosovo Albanian prosecutors and judges to apply Serbian and Yugoslav statutes as required by UNMIK's first Regulation covering the issue of applicable law,<sup>839</sup> the SRSG revised it to exclude laws passed by Belgrade authorities between March 1989 and 1999 if they were 'discriminatory' and contravened international human rights instruments applicable in Kosovo.<sup>840</sup> With this Regulation, SRSG Kouchner reinstated the law applicable in 1989 without explicitly exempting the then-applicable body of constitutional law. Presumably, the intention was not to re-create the institutional arrangements existing in Kosovo in March 1989. This Byzantine arrangement of partial re-institution of the pre-UNMIK legal order was rendered more obscure by vesting the singular faculty to decide whether the legal avenue to the past should be opened within the supreme authority of the SRSG. According to this arrangement, domestic courts are allowed to seek from the SRSG a binding clarification on whether to apply law in force between 1989 and 1999.<sup>841</sup>

(i) POLICING THE BORDER BETWEEN PAST AND FUTURE GOVERNMENT AUTHORITY

To present this complexity in a simplified manner, at least three layers of applicable norms can be distinguished. The first is the (diminishing) legacy of the Socialist Federal Republic of Yugoslavia's (SFRY) legislation and Serbian municipal statutes. The second layer corresponds to the body of UNMIK Regulations and Administrative Directions as well as those laws passed by the Kosovo Assembly which were subsequently promulgated by the SRSG.<sup>842</sup> The third layer represents the instruments of international law imported into the domestic

<sup>838</sup> F.M. Lorenz, 'The Rule of Law in Kosovo: Problems and Prospects', 11 *Criminal Law Forum* 127-142 (2000), at 130.

<sup>839</sup> UNMIK/REG/1999/1, *supra* note 598, provided that the "laws applicable in the territory of Kosovo prior to 24 March 1999 shall continue to apply in Kosovo..." (s.3). For a concise background to the concerted act of 'civil disobedience' by Albanian judges, see Brand, *International Administration*, *supra* note 597, at 148 *et seq.* and Miller, 'UNMIK', *supra* note 837, at 14-15. For a perspective on the practical problems encountered in the sphere of law enforcement, cf. also Colette Rausch, 'The Assumption of Authority in Kosovo and East Timor: Legal and Practical Implications', in *Executive Policing: Enforcing the Law in Peace Operations* 11-32 (ed. by R. Dwan, New York: OUP, 2002).

<sup>840</sup> UNMIK/REG/1999/24 *On the Applicable Law in Kosovo* (12 December 1999), stipulates that "[i]f a court of competent jurisdiction...determines that a subject matter or situation is not covered by the law set out in s.1(1)...but is covered in another law in force after 22 March 1989 which is not discriminatory..., the court...shall, as an exception, apply that law" (s.1.2). As the Ombudsperson in Kosovo correctly observed, it has become "somewhat difficult to determine...whether or not a certain law is discriminatory if there is no independent judicial organ to do so" (*Fourth Annual Report (2003-2004)*, Prishtina 2004, at 16). For a similar *problématique* in East Timor see Morrow/White, 'East Timor', *supra* note 504, at 8 as well as Beauvais, 'Benevolent Despotism', *supra* note 774, at 1151-1152. UNTAET/REG/1999/1, *supra* note 598, provided that the body of law that had applied in East Timor before the adoption of S/RES/1272/1999 should continue to apply unless it contradicted internationally recognised human right standards. Previously applicable Indonesian law would not apply if it conflicted with that Regulation or any subsequently promulgated UNTAET regulation or directive (s.3).

<sup>841</sup> According to UNMIK/REG/1999/24, "[c]ourts in Kosovo may request clarification from the [SRSG] in connection with the implementation of the present regulation. The [SRSG] shall provide such clarification for the consideration of the courts in the exercise of their functions" (s.2). This provision is hardly justifiable, especially in the field of criminal law, as the SRSG basically turns into an organ that provides binding guidance to the courts. See Frowein, 'Notstandsverwaltung', *supra* note 141, at 51. For an argument that such 'clarification', if amounting to a binding interpretation, violates the right to a fair trial guaranteed under Art. 6 ECHR see Nuala Mole, 'Who Guards the Guards - the Rule of Law in Kosovo', 3 *EHRLR* 280-299 (2001), at 296.

<sup>842</sup> All laws thus promulgated, as a rule, contain omnibus provisions stating that they supersede all previous laws concerning the same subject matter.

legal order. The normative arrangement established in Kosovo hence suggests that the principle according to which the validity of one domestic legal order excludes the application of any other domestic legal order<sup>843</sup> was temporarily suspended. Predictably, this has caused uncertainty as to which (S)FRY laws have been superseded by UNMIK legislation, and which ones continue to remain valid and/or applicable within the territory.<sup>844</sup>

The transition from illegitimate and illiberal to legitimate and liberal under these three normative layers exemplifies the operation of the transitional paradigm. According to *Teitel*, one of the defining features of the rule of law in periods of political change is that it indeed preserves some degree of continuity in legal forms while it enables normative change. UNMIK's decision to partially re-instate the previous legal order was certainly informed by an understanding that a *Rechtsstaat* must supply normative intersections through which claims that arose in the old order can be realised in the new one. An international agent, though pursuing a 'foundational' moment to institute political change within a *polis* at a constitutional point zero,<sup>845</sup> is obligated to provide retrospective avenues through which the rule of law can be rooted in notions of continuity.<sup>846</sup> The emergent versions of constitutionalism and transitional law-making are thus ambivalent in their direction; under conditions of suspended sovereignty, law performs the work of continuity and separation from the previous regime as well as that of integration with its successor. UNMIK, in a metaphorical rendering, hence polices the border between past and future government authority through an import of legal forms.

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<sup>843</sup> Cf. Hans Kelsen, *General Theory of Law and State* (Vol. 1, 20<sup>th</sup> Century Legal Philosophy Series: New York, 1961), at 213.

<sup>844</sup> With reference to German constitutional doctrine, UNMIK Regulations and subsidiary instruments, including local Kosovo laws promulgated as such (cf. *infra* p.219), arguably possess *Anwendungsvorrang*, but not *Geltungsvorrang* with respect to (S)FRY statutes. For a discussion of the legal uncertainty in the specific field of property legislation see von Carlowitz, 'Crossing the Boundary', *supra* note 614. As Brand notes, it is also unclear whether provisions of the 1974 Kosovo Constitution apply, and whether the body of applicable law includes, e.g., SFRY federal and SRS republican constitutional laws, municipal statutes and regulations, workers' council decisions, united labour court procedures, mining and woodcutting licenses and the rules governing the socio-economic relations between municipalities and socially owned companies (*International Administration*, *supra* note 597, at 155).

<sup>845</sup> Adapted from Ruti G. Teitel, 'Transitional Jurisprudence. The Role of Law in Political Transformation', 106 *Yale LJ* 2009 (1996-1997), at 2057.

<sup>846</sup> The partial reconstruction of the previous order in an internationalised territory is to some degree predicated on the obligations of a trustee to observe the limits that international law places upon her. Under the doctrine of acquired rights, rights once vested in accordance with law under a previous regime are, subject to certain exceptions, to be accorded full recognition by its successor. It is, however, entirely unclear whether an international territorial administration is, e.g., bound by Article 43 of the Hague Regulations and the "duty to respect...the existing laws in force". Treating UNMIK as belligerent occupant would limit its power to an extent where it may only make changes absolutely necessary to meet the basic needs of the indigenous population. Public order requirements support the counter-argument, namely, that is the precise task of an international peace-building mission to effectuate normative change through the overall reform in all areas of law. The reasoning of the Committee that, in 1952, submitted its report on the legal problems facing the UN can also be considered here: "the United Nations should not feel bound by all the laws of war, but should select such of the laws...as may seem to fit its purposes..., adding such others as may be needed, and rejecting those which seem incompatible with its purposes" ('Should the Laws of War Apply to United Nations Enforcement Action?', 46 *Proceedings of the ASIL* 216-220 (1952), at 2202). For a discussion of the applicability of international humanitarian law to UNMIK see von Carlowitz, 'UNMIK Lawmaking', *supra* note 142, at 372-374 (arguing that Article 43 cannot be applied as guideline for all aspects for international lawmaking and policy). See also the brief discussion in Chapter V.2.2 (i), *supra*, note 716.



Kosovo's transitional legal order is simultaneously forward-looking in receiving an ideal 'operating system' – mechanisms and processes designed to ensure orderly compliance with norms. Local courts, created under the international agent's mandate, rely on interpretations of the rule of law which are transmitted from the international legal order. New political institutions and rules of procedures governing, for example, the newly constituted legislature are closely modelled after Western conceptions, if not entirely designed by foreign experts. International legal advisers funded by various foreign agencies are involved in drafting and processing commercial and economic laws within both the local government and the legislature. Electoral rules are crafted in favour of those whom international officials understand to be advocates of 'moderate' politics.<sup>847</sup> The asymmetrical 'dual-key' institutional arrangement that divides competencies between international and local institutions is devised as a constitution which directly imports existing international standards of human rights protection.

## (II) THE COLLAPSE OF DUALISM AND THE PROMISE OF A LIBERAL FUTURE

The derogation of the previous legal order by the UN Security Council and the establishment of a territorial legal system rooted in an international legal source operationalised a two-fold belief: firstly, that ideational standards can be coherently expressed through practices and organisations of international life and, secondly, that external pressure can be applied to domestic actors in order to effectuate cognitive shifts in the target territory.<sup>848</sup> On 10 June 1999, the territory of Kosovo was directly submitted to international law – a condition that enabled the seamless import of international liberal practices and value schemes. The normative environment of a 'perfectly internationalised' territory resembles, *in extremis*, a monist model, in which municipal and international law form part of a unitary normative system.<sup>849</sup> The collapse of the 'impermeable wall' between the international and national legal orders<sup>850</sup> encapsulates a characteristic of a UN-administered territorial unit which, though not sovereign, is exclusively subject, without the intervention of any other state entity, to international norms and legislation created by the international organ administering it.

As a result of the collapse of the dualist separation between international and internal legal orders, international legal instruments have a 'direct' statute-like role in the domestic legal order of an internationalised territory. In the area of contract law, for instance, UNMIK simply imported the 1980 *UN Convention on the International Sale of Goods* into municipal law.<sup>851</sup> A

<sup>847</sup> Cf., for instance, International Crisis Group Discussion Paper, *Beyond Ballot Boxes: Municipal Elections in Bosnia and Herzegovina* (Sarajevo, 10 September 1997). For further references to the OSCE's 'benign' electoral engineering in Bosnia, cf. Caplan, *International Governance*, *supra* note 19, at 127-128 and Roland Paris, *At War's End. Building Peace After Civil Conflict* (Cambridge: CUP, 2004), at 104-106. For a far more critical, if not populist, appraisal see Chandler, *Bosnia*, *supra* note 11, at 188 *et seq.*

<sup>848</sup> Cf. Šabić, *Bosnia-Herzegovina*, *supra* note 4, at 218.

<sup>849</sup> Cf. O'Connell, *International Law*, vol. I, *supra*, note 43, at 39 *et seq.* and Cassese, *International Law*, *supra* note 495, at 215-16.

<sup>850</sup> Eric Stein, 'International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?', 88 *AJIL* 427-450 (1994), at 428.

<sup>851</sup> UNMIK/REG/2000/68 *On Contracts For the Sale of Goods* (29 December 2000). As Muharremi *et al.* critically note, this approach introduced common law terminology unknown to local lawyers trained in continental civil law (*Administration and Governance in Kosovo: Lessons Learned and Lessons to Be Learned* (Geneva: Centre for Applied Studies in International Negotiations, 2003), at 15).

situation in which an international organisation adopts norms which, similar to domestic legislation, have binding effect on private persons within the sphere of a territory remains, of course, exceptional.<sup>852</sup> It means that Kosovo courts as well as other government bodies will look to international treaty language itself as a source of law, similar to the way they consider instruments of municipal law.<sup>853</sup> As a corollary, the local legislature lacks the capacity to 'transform' international law, implying that canons of international treaty interpretation are directly imported into the domestic setting without a 'constitutional gesture' of that local legislature.<sup>854</sup>

This is of particular importance where norms of international law purport to confer or recognise individual rights, especially in instances where an international legislative organ weaves such rights into constitutions, legislation, and instructions regarding administrative governance and other institutional settings.<sup>855</sup> The unmediated import of international treaty law into the municipal context is also exemplified by UNMIK's commitment to entrench the ECHR within Kosovo's legal order, though the FRY, the nominal sovereign, had not yet become a party to the agreement.<sup>856</sup> The explicit imposition of the *jus publicum Europaeum* upon an internationalised territory is, of course, highly symbolic. The reference to a European public order not only imbued the new United Nations governance framework with legitimacy. The import of liberal conceptions and practices and the superimposition of foundational ideals of a legal order, particularly in the spheres of constitutional and criminal law, also aim at sanctifying the rituals of political passage and facilitating the normative shift from an *ancien régime* to a liberal future in which political competition is to be constitutionally

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<sup>852</sup> Philippe Sands and Pierre Klein (eds.), *Bowett's Law of International Institutions* (5<sup>th</sup> ed., London: Sweet & Maxwell, 2001), at 285.

<sup>853</sup> Cf. John H. Jackson, 'Status of Treaties in Domestic Legal Systems. A Policy Analysis', 86 *AJIL* 310-340 (1992), at 321.

<sup>854</sup> For the transformation doctrine cf. O'Connell, *International Law*, vol. I, *supra* note 43, at 49. There are sound reasons for a national legal system to avoid the combination of direct application of treaties in domestic law. Obviously, the absence of constitutional rules of recognition of international treaties represents a problem for democratic legitimacy as the local legislature will not be in a position to approve or disapprove of a certain instrument taking effect. Nor can it clarify ambiguous treaty provisions to fit them into the municipal legal order (Cf. Jackson, 'Status of Treaties', *supra* note 853, at 323-4). Further, the absence of a Constitutional Court in internationalised territories implies that the role of judicial actors in translating international influence into constitutional arguments is severely curtailed.

<sup>855</sup> For a critical appraisal of the 'transplantation' metaphor as one of the lead paradigms of comparative law, cf. Florian F. Hoffmann, *Are Human Rights Transplantable? Reflections on a Pragmatic Theory of Human Rights under Conditions of Globalization* (Ph.D. thesis, European University Institute, 2003), especially at 115 et seq. It is questionable whether it is appropriate to utilise the terminology of 'transplantation' if a vertical transfer is meant. As Örüçü suggests, the term 'transposition', used in music, may be more apt: "[e]ach note (legal institution or rule) is sung (introduced and used) at the same place in the scale of the new key (of the recipient) as it did in the original key (of the model); the 'transposition' occurring to suit the particular voice-range (socio-legal culture and needs) of the singer (the recipient)" (*Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition* (Deventer: Kluwer Law, 1999). This chapter, however, prefers to speak of unmediated 'imports' of legal concepts.

<sup>856</sup> UNMIK/REG/1999/24, *supra* note 840, states that "in exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognised human rights standards...", followed by an impressive list of human rights instruments, among them the ECHR and the ICCPR (s.1.3). The Union of Serbia and Montenegro (SCG) has only ratified the ECHR on 3 March 2004.

bounded.<sup>857</sup>

In what seems like a remote promise of a liberal future, the Venice Commission concluded, in one of its recent reports, that "[i]t is certainly unwarranted to leave the population of a territory in Europe indefinitely without access to the Strasbourg Court."<sup>858</sup> This is an extraordinarily utopian proclamation. It over-subscribes to *Paris'* reformulation of a peace-building agenda as mere *mission civilisatrice* and its testimony to a liberal bias in an international mission's promotion of Western conceptions of human rights.<sup>859</sup> Internationalisation reaches beyond the conventional means of democracy assistance in cases of less intrusive multi-lateral operations. Ambitions aimed at the internationalisation of territory seek to actively draw the periphery into a wider area of shared standards in order to deal with the treacherous issues of group identity in divided societies and the provision of remedies necessary to counter mass violations of human rights.<sup>860</sup> Institution-building agents aspire to nothing less than the temporary yet wholesale import of foreign constitutional and administrative systems. Democratic regime-building by an international organ can hence be understood as the operationalisation of these aspirations in the context of transnational norm entrepreneurship.<sup>861</sup>

Recognising that we are dealing with ideal types, the transmission of legal standards to the periphery of the international system follows the extraordinary paradigm of transformative law in that it intends to construct liberalising change.<sup>862</sup> This transmission within a monist model underscores UNMIK's commitment to crafting an internationalised polity in the precise image of the core. Institution-building agencies indeed seek to "achieve a set of universal

<sup>857</sup> Cf., however, Pajić's claim that the ECHR had been "smuggled into the legal order" of BiH when it was not yet member of the Council of Europe ('A Critical Appraisal of Human Rights Provisions of the Dayton Constitution of Bosnia and Herzegovina', 20 *HRQ* 125-138 (1998), at 131).

<sup>858</sup> *Opinion, supra* note 616, at 17. Another CoE paper specified that the full application of CoE treaties to Kosovo "would be perfectly in line with the international community's concern to facilitate the territory's integration into European structures" (*Note on the Applicability of Council of Europe Conventions in Kosovo and in BiH*, prepared by DG I, DG II and DGAP for the Meeting with the Head of the OSCE Mission in Kosovo (Prishtina, 13 June 2002), at 4). This may be the case. However, as the brief discussion at note 888 demonstrates, these promises are not accompanied by any remedies through which Kosovars could access the *jus publicum Europaeum*.

<sup>859</sup> Cf. 'Mission Civilisatrice', *supra* note 11, at 639 *et seq.*

<sup>860</sup> Fionnuala Ni Aolain, 'The Fractured Soul of the Dayton Peace Agreement: A Legal Analysis', 19 *Michigan JIL* 957-1004 (1997-1998), at 978. The problems that such a utopian proposition encounters are best illustrated when examining the ECHR's criteria for establishing 'jurisdiction'. See *infra*, page 223.

<sup>861</sup> The term is borrowed from Harold H. Koh's identification of key agents in the transnational legal process ('Bringing Human Rights Law Home', 35 *Houston LR* 623-681 (1998-1999), at 646-655). Cf. also the discussion of the role of 'norm entrepreneurs' for the emergence of norms by Finnemore and Sikkink in 'International Norm Dynamics and Political Change', in *Exploration and Contestation in the Study of World Politics* 247-277 (ed. by P.J. Katzenstein, et al., Cambridge, Mass.: MIT Press, 1999), at 256-259. Value transfers are of course not as one-dimensional as our brief account suggests. For a case in which the policy in question (namely, regulatory standards imposed on broadcast and print media and the (European) understanding of the role of a Public Broadcaster) was criticised by the US, cf. Laura Palmer, 'A Very Clear and Present Danger: Hate Speech, Media Reform, and Post-Conflict Democratization in Kosovo', 26 *Yale JIL* 179-218 (2001).

<sup>862</sup> Teitel, *Transitional Justice, supra* note 832, at 213.

moral...imperatives based on 'shared values'...and regulative norms".<sup>863</sup> The hardest evidence of the wholesale import and internalisation of internationally shared values lies in the practice of institutions, placed at the intersection of domestic and international law, which make the law and render binding interpretations of it. The absence of a clear-cut hierarchy of norms, discussed in the following section, provides a strong indicator of the intensity with which the organised international community endeavours to affect normative change in a temporarily internationalised polity.

### 6.2.2 THE ABSENCE OF HIERARCHY OF LOCAL NORMS

In the case of Kosovo's temporary internationalisation, such coercive processes of socialisation were initiated by the Security Council, which displaced the previous legal orders' sphere of applicability. UNMIK came to occupy a unique position in the Kosovo legal system: it became part of the domestic constitutional order, and at the same time remains superior to it.<sup>864</sup> Our observation that sources of law within an internationalised territory are hybrid to the extent that 'old' Yugoslav and Serbian law is considerably interlaced with a new body of UN law confirms *Ruffert's* conclusion that the "conglomeration of UN-regulations and existing provisions is the legal order of Kosovo..., though containing international legal elements for the sake of guaranteeing their conformity with higher ranking international law".<sup>865</sup>

#### (I) UNIFORM PROMULGATION

Law in an internationalised territory under fiduciary administration operates at the intersection of municipal and international normative spaces. This insight leads us to grasp how an international administration attempts to steer liberalising change by importing not only discrete 'packages' of ideal-type Western legislation but also a *tertium comparationis* – a

<sup>863</sup> Isa Blumi, 'One Year of Failure in Kosova: Chances Missed and the Unknown Future', 1:1 *Southeast European Politics* 15-24 (2000), at 17. Again, it must be emphasised that the project of international institution-building is characterised here in an ideal-type manner which abstracts from social and cognitive aspects of norm-building. International norms must always work their influence through the filter of a domestic structure, which can produce important variations in their interpretation – processes ignored by Blumi whose dubious suggestions read, in pertinent parts, like a transcript of an imaginary encounter between KLA General Agim Ceku and Michel Foucault ("...locals have a strong sense of duty of maintaining order in their lives. Their fight with Belgrade's colonialism represented a dynamic of communal bonding and self-sacrifice that could have been cultivated by UNMIK." *Id.*, at 19). As Hoffmann reminds us, legal transplants are surrounded by a web of local significances, and are subject to manipulation by local actors in a variety of ways. Every such manipulation creates repercussions which reconfigure the original transplant, initiating a recursive process of adaptations which adds further layers to an emerging transnational precedent. The possibility of 'transplantation' hence depends on the particular configuration of a local community's legal culture (*Transplantable*, *supra* note 855, at 205 and 227-229). What we mean to underscore here is the international institution-building agencies' intention to increasingly link domestic and international norm tables – a process which Finnemore/Sikkink describe as 'norm cascades' (*supra* note 861, at 262-264). For a highly obscure and factually wrong yet original approach to UNMIK as a case in which international society reproduces liberal conceptions to non-liberal areas through the frame of 'disaggregated' sovereignty, cf. David Schleicher, 'Liberal International Law Theory and the United Nations Mission in Kosovo: Ideas and Practice', 14:2 *Tulane JICL* (forthcoming in December 2005).

<sup>864</sup> This conclusion is inspired by Marcus Cox's treatment of the OHR in BiH's constitutional order in *Bosnian State*, *supra* note 23, at 91.

<sup>865</sup> 'Administration', *supra* note 144, at 624. Note the similarities to the situation in East Timor after 1999 where the sequence of UNTAET Regulations "sidestepped the problem of the relationship between Indonesian legal standards and applicable customary international law" (Morrow/White, 'East Timor', *supra* note 504, at 9).

standard, or 'benchmarks', against which the performance of the 'import' is measured.<sup>866</sup> The propositions advanced here reach beyond the transitional framework in which law mediates between two regimes. They concern the difficulties in determining, in practice, the *sources* and *hierarchy* of applicable local law. As a point of departure for the following analysis, we submit that a specific autological relationship – a hierarchy between norms of 'higher' constitutional quality and ordinary municipal statutes – does not exist in Kosovo. Apart from the Resolution 1244, all applicable law in Kosovo is formally promulgated as 'UNMIK Regulation' (or as subsidiary instrument) or has been declared applicable by such an instrument.<sup>867</sup> The relationship between the first two normative 'layers' of which this chapter previously spoke – UNMIK Regulations and Kosovo 1989 law which has not been superseded by the former – remains, however, entirely unresolved. The absence of formal differentiation of legal norms – their equal 'position' within a transitional legal order – is, indeed, the result of a territory's temporary direct submission to international law, a situation in which the international legal order directly interferes with the territory's constitutional order.

Kosovo's institution-building framework, presented in section 1 of this chapter, opens the investigation into the particularities of a 'dual-key' governance setting in which authority is exercised by an international administration that is temporarily vested with virtually unchecked executive and legislative powers. Along the unfolding institution-building sequence as foreseen by Resolution 1244, the international agent is vested with a (decreasing) measure of authority to supervise the work of local institutions which, on the other hand, gradually assume competencies for a certain range of issues and discharge municipal functions according to their autonomous sphere of action.<sup>868</sup> As a result of the creation of a *sui generis*, loosely configured political system, the legislative process in the sphere of 'reserved' powers differs from that in the areas of 'transferred' powers. In the former, Regulations and subsidiary instruments continue to be drafted by the respective UNMIK component 'pillars', reviewed by UNMIK's Legal Adviser as well as the UN's legal office in New York with a view to ensuring that such legislation complies with Resolution 1244.<sup>869</sup> On the other hand, under the Constitutional Framework's procedures, the laws adopted by the Kosovo Assembly (*ligj/zakon*) have to be uniformly promulgated by the SRSG, also as

<sup>866</sup> Cf. Hoffmann, *Transplantable*, *supra* note 855, at 130. The measuring of transplantation progress that is to indicate approximation towards a stereotypical 'normalcy' can be clearly observed in Kosovo. As already noted in the previous Chapter, UNMIK instituted a policy of 'benchmarking' through which indicators were to be developed in several governance spheres.

<sup>867</sup> This includes the Constitutional Framework which contains substantive constitutional rules (*supra*, note 622). The CF shares its 'rank' with all other UNMIK Regulations. It contains no 'immutability clause' which would protect certain of its central norms from alteration by UNMIK (Stahn, 'Constitution without a State', *supra* note 607, at 546).

<sup>868</sup> The asymmetrical 'dual-key' arrangement was established by the CF which divides all spheres of governmental authority into powers that are to be 'transferred' to the newly created PISG (Chapter V of the CF) and 'reserves' others for the continued exercise by UNMIK (CF Chapter VIII). The latter mostly concern 'sovereignty'-related matters such as external relations, the administration of state and public property and enterprises, control over the civil registry database, railways and civil aviation, protection of minority rights, public order and safety, defence, and the appointment and removal of judges and prosecutors.

<sup>869</sup> See Stahn, 'Origins', *supra* note 516, at 107. Zygojannis' suggestion that the Office of Legal Affairs assumed functions of 'control' over UNMIK activities (*Die Staatengemeinschaft und das Kosovo*, Berlin: Duncker&Humblot, 2003), at 223) is, however, open to challenge. In some instances, as Brand notes, UN OLA was only consulted *after* the instrument had already been promulgated (*International Administration*, *supra* note 597, at 200).

## UNMIK Regulations.<sup>870</sup>

### (ii) 'MEDIATE UNITED NATIONS LAW'

Examples from the legislative practice of Kosovo's local institutions further illustrate the impact of a complex 'dual-key' power sharing on the hybrid nature of the legal system. The indeterminate 'texture' of the relevant provisions of the Kosovo's Constitutional Framework leaves a wide range of 'grey' areas which touch upon both 'transferred' and 'reserved' competencies. There, the drafting of laws resembles a patchwork exercise seeking to stitch together inputs from both local Ministries and UNMIK.<sup>871</sup> Instead of sending the draft back to the Assembly, the SRSG alternatively proceeds by introducing amendments that he deems are required by what we term international legal forms. Notably, the SRSG goes forth with the promulgation of the relevant law by adding changes to the Assembly version as attachment to the Law. Absent procedures indicating the competent institution to incorporate UNMIK changes into the published (bilingual) translations of the law, UNMIK has adopted a minimalist position, insisting it publish the authentic version of the law (in English) on its web-site, while refusing to guarantee the authenticity of the Albanian or Serbian translations.<sup>872</sup>

In a strictly formalist sense, it has at times become virtually impossible to decide whether the thus amended laws can still be considered as 'Assembly laws' or whether they originate from a hybrid constitutional source. While the syncretism of sources of normative acts is, as we maintain, a defining feature of government activity at the intersection between municipal and international law, the uncertainty as to a law's exact source has troubling implications: while laws passed by the Assembly can be subject to constitutional review by the Special

<sup>870</sup> Chapter 9.1.45 of the CF, *supra* note 618. 'Resolutions' of the Assembly remain non-binding declarations (Chapter 9.1.26). This implies that final competence to issue normatively binding acts is, in any case, outside the scope of authority of local institutions. By way of qualification, it should be noted that the '*Zustimmungsvorbehalt*' of UNMIK is reminiscent of the practice of the Allied occupation authorities in Germany. Like in the case of Kosovo, the passing of local laws was conditioned upon the consent of the allied administration: "Die Besatzungsmächte machen die Gültigkeit eines...Gesetzes von ihrer Zustimmung abhängig...weil sie die deutschen Beschlüsse daraufhin überprüfen wollen, ob sie den Absichten der Besatzungspolitik widersprechen" (Hans Schneider, '*Mittelbares Besatzungsrecht*', 75:4 *AdV* 494-500 (1945), at 497).

<sup>871</sup> Cf. Robert Muharremi, 'Legislative Procedure According to the Constitutional Framework, 4:1 *Kosovo Legal Studies* 2-6 (2003). Literature on the Allied administration of Berlin refers to the practice of issuing laws, directives and orders as '*versteckte Besatzungsakte*' – "Maßnahmen, die zwar von den deutschen Behörden erlassen werden, die aber so stark von Einflüssen der Besatzungsmacht geprägt sind, daß in Wahrheit der Wille der Besatzungsmächte für den Erlaß dieser Akte entscheidend ist" (Joachim Herbst, '*Gerichtlicher Rechtsschutz gegen Hoheitsakte der Alliierten in Berlin (West)*' (Frankfurt a.M.: Peter Lang, 1991, at 14).

<sup>872</sup> Until mid-2005, the absence of a Law on the Official Gazette through which legal acts (including the SRSG's own regulations) were published and disseminated has reinforced the uncertainty as to the body of applicable law. The procedures were puzzling indeed. Responsibility for the publication of Assembly Laws lay with the PISG. The Assembly's Secretariat made these laws available to the Official Gazette Unit within the (UNMIK) Department of Administrative Services which subsequently posted them on the UNMIK website. The Kosovo Assembly, however, maintained its own website that included a section dedicated to the publication of Assembly laws and promulgated regulations. Erroneous postings that include mark-up comments and translation errors occurred frequently. That flawed translations of law constitute one of the chief factors that contribute to legal uncertainty in Kosovo has been recognised ever since UNMIK's deployment (Cf. International Crisis Group, '*Finding the Balance: The Scales of Justice in Kosovo*' (Europe Report No. 134, 12 September 2002), at 13). The Law on the Official Gazette was adopted by the Kosovo Assembly in September 2004 (Law No.2004/47), and promulgated by the SRSG only on 12 May 2005 (UNMIK/REG 2005/25).

Chamber of the Supreme Court of Kosovo,<sup>873</sup> a determination that a law's content is attributable to UNMIK would remove it from any scrutiny whatsoever.

The practice of instituting 'mediate UN-law' – defined here, with reference to 'mediate occupation law', as United Nations law by form and local law in terms of material content<sup>874</sup> – was repeatedly criticised by the Council of Europe's Venice Commission. It suggested that this practice would exceed the limits that have been placed by the Constitutional Framework upon the structural collaboration between the SRSG and the emerging local institution.<sup>875</sup> The relation between normative acts stemming from an international source and local laws is characterised by the sort of inconsistency we expect under conditions of a tenuous partnership between international and local institutions. The absence of a hierarchy among normative acts possessing statutory force within the local executive branch entails difficulties as it also creates gaps in legal certainty. Addressing the situation within the local executive branch, the OSCE Mission in Kosovo has not only noted deficiencies in the issuing of subsidiary legislation by local institutions, but has also recommended the adoption of a Law on Normative Acts defining the types and hierarchy between normative acts in general, including the different categories of subsidiary acts.<sup>876</sup>

### 6.2.3 THE UNACCOUNTABILITY OF AN INTERNATIONAL ADMINISTRATION

The import (and superimposition) of liberal conceptions of governance, facilitated by the assumption of temporary jurisdiction by an international territorial administration, has also been met by a critique of the ways through which the administration dispenses its supreme authority. Briefly, the argument suggests that progress towards developing democratic structures will, through a process of local mimicry, be slow and incomplete if the means employed toward that end resemble authoritarian administration. In (continental European) constitutional democracies, a hierarchy of norms implies a differentiation between constitutional and ordinary jurisdiction, and between constitutional and ordinary law. The constitutional review of political legislation has developed extensive techniques to neutralise political decisions, fit result-oriented 'policies' into legal doctrine in accordance with criteria of consistency, and, in the most serious cases, pronounce legislative acts unconstitutional.<sup>877</sup> Judicial review is, in a state of law, seen to be the corollary of an attribution of powers: its

<sup>873</sup> Article 9.4.11(a) of the CF, *supra* note 618. The Special Chamber, it must be added, is not functioning. By mid-2005, the competent UNMIK authorities were no closer to establishing it than in 2001.

<sup>874</sup> Cf. the reference to '*mittelbares Besatzungsrecht*', *infra* note 922.

<sup>875</sup> *Opinion*, *supra* note 616, at §138 (p. 25).

<sup>876</sup> *Implementation of Kosovo Assembly Laws by the Executive Branch of the Provisional Institutions of Self-Government. Review Period: Laws Promulgated in 2002-2003* (Prishtina, January 2005), at 21. UNMIK/REG/2001/19, *supra* note 600, specifies only two categories of subsidiary acts that could be issued by the ministers: decisions and administrative instructions (s.1.3(d)). However, many of the laws passed by the Kosovo Assembly within the period 2002-2003 refer not only to these two categories of subsidiary acts, but also to 'rules', 'implementing rules', 'regulations', 'directives', and 'guidelines'. UNMIK/REG/2003/15 *Law on External Trade Activity* (12 May 2003), for instance, reprises such haphazardly all-inclusive typology when it stipulates that "normative act" shall mean (i) any law, decree, resolution, normative act, sub-normative act, regulation, administrative direction, instruction, rule, ordinance, or other act that is recognised or represented as having normative force within the territory of Kosovo by any public authority, and (ii) any international agreement that international law considers binding upon Kosovo" (Chapter I, s.2).

<sup>877</sup> Gunther Teubner, 'Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory' (unpublished paper, 2001), at 7.

use must conform to the law and the action of any government body is subject to the control of courts as *ultima ratio*. Indeed, the rule of law in transitional regimes came to be associated with rule by courts, and particularly rule by constitutional courts.<sup>878</sup>

The 'thin' understanding of democratic constitutionalism in an internationally administered territory is, according to its critics, best demonstrated by pointing at the continuation of a practice precluding independent review of the UN's normative acts that have territorial validity. No international territorial administration, so the argument proceeds, has yet proposed that its legislative enactments be brought into conformity with constitutional requirements through an institutionalised set of measures to ensure 'horizontal' accountability.<sup>879</sup> This and other deficiencies in the implementation of liberal positions has led one author to suggest recently that an international administration "stands outside the normative framework of international society because it is an arrangement of power rather than one of law".<sup>880</sup>

The last section of this thesis will only partially agree with this proposition. In the first part, we will pursue our discussion of the legal order in order to demonstrate how UNMIK insulated itself against demands to submit its acts to judicial review and failed to provide effective remedies for human rights violations. The second step will offer examples from other territories under international tutelage as to how the issue of norm control was broached. The third part will build upon, and go beyond, considerations of norm control and judicial review to briefly expand upon another dimension of accountability, namely the liability of international organisations for wrongful acts. There, the structure of the argument draws on the analysis of the dual functions of an international administration presented in Chapter IV.

#### (I) A HUMAN RIGHTS VACUUM?

*'The [ECHR] was not designed to be applied throughout the world.'*<sup>881</sup>

*'As such, KFOR detentions are entirely distinct from cases that must be processed throughout the Kosovo judicial system.'*<sup>882</sup>

The past six years of international institution-building in Kosovo have not only exposed the frailty of a transitional legal order which seeks to accommodate both backward and forward-looking elements. It also exhibited what one commentator termed a contradiction that lies at the heart of UN-mandated territorial administration: namely, its inability to take full advantage of the entire spectrum of means ensuring vital aspects of good governance that are regularly encountered in liberal constitutions. Kosovo represents a case in which institutions of 'constitutional self-restraint' remain absent long into the institution-building sequence. While

<sup>878</sup> Cf. Kim Lane Scheppele, 'Constitutional Interpretation after Regimes of Horror', *Public Law and Legal Theory Research Paper Series* 1-30 (University of Pennsylvania Law School, 2000), at 24.

<sup>879</sup> For the concept of 'horizontal' accountability as relationship between government agencies see Andreas Schedler, 'Conceptualising Accountability', in *The Self-Restraining State: Power and Accountability in the New Democracies* (ed. by A. Schedler, L. Diamond, and M.F. Plattner, Boulder, CO: Lynne Rienner, 1999), at 22-25.

<sup>880</sup> Bain, *Anarchy*, *supra* note 18, at 153.

<sup>881</sup> *Banković* case, *supra* note 47, at §80.

<sup>882</sup> Letter from SRSG Hækkerup to OSCE Head of Mission, Amb. Everts (Prishtina, 31 August 2001), p. 2.



it created rules to govern the functioning of local institutions, the applicable legal framework has failed to set limits on the powers of the international territorial administration. This practice is seen to be particularly problematic as UNMIK has, into mid-2005, retained administrative authority over justice and law enforcement – areas which are closely entwined with human rights guarantees. Even more worryingly, individuals within the territory continue to lack the basic protection mechanism that derives from Serbia and Montenegro's increased acceptance of international human rights instruments in the past two years.<sup>883</sup>

The extent to which Kosovars can rely on the ECHR to bring claims in front of the Strasbourg Court is less than clear. The problem can be broken down into three issue areas which shall be briefly touched upon. It can be formulated in terms of an instance of extra-territorial applicability of international human rights instruments in which ECHR signatories are 'projecting' their *espace juridique* beyond their territorial boundaries. The issue gravitates around the interpretation of the term 'jurisdiction' in Article 1 of the ECHR and the question of whether anyone adversely affected by an act imputable to a Contracting State – wherever in the world that act may have been committed or its consequences felt – is thereby brought within the jurisdiction of that State.<sup>884</sup> In short, the first issue concerns the question whether the jurisdiction of a state follows the exercise of public authority by that state and whether its authorised agents (including armed forces) bring other persons 'within the jurisdiction' of that state when abroad. The Court found that the extraterritorial applicability of the ECHR in those special cases is the consequence of the exercise of control by the State party of an

<sup>883</sup> This refers particularly to the right to an effective remedy before a national authority for a human rights violation (Art. 13 ECHR) which applies in Kosovo not only by way of its incorporation in the Constitutional Framework (*supra*, note 618). SCG has ratified the ECHR without formulating reservations concerning the territorial application of the CoE instruments. With reference to Article 29 of the 1969 Vienna Convention on the Law of Treaties, there is thus a presumption in favour of the 'application' of the CoE treaty to the entire SCG territory, including Kosovo (cf. CoE *Note Applicability*, *supra* note 858, at 1). It must be added, however, that SCG is prevented from (legally) exercising its jurisdiction in the territory of Kosovo due to the presence of UNMIK and KFOR. For Serbian parallel structures and their (illegal) exercise of effective control see Chapter V, *supra* notes 590 and 591.

<sup>884</sup> *Banković* case, *supra* note 47, at §75. The case is authoritatively discussed by Georg Ress, 'State Responsibility for Extraterritorial Human Rights Violations. The Case of Bankovic', *ZEuS* 73-89 (2003). For two critical reviews of the case, see Ralph Wilde, 'The "Legal Space" or "Espace Juridique" of the European Convention on Human Rights: Is It Relevant to Extraterritorial State Action?', 2 *EHRLR* 115-124 (2005), and Gérard Cohen-Johnathan, 'La territorialisation de la juridiction de la Cour européenne des droits de l'homme', *RTDH* (2002), at 1069 *et seq.* The Court concluded that extraterritorial jurisdiction can specifically be recognised in cases where a state effectively controls the relevant territory and its inhabitants (whether as a consequence of military occupation or with the consent, invitation or acquiescence of the territorial government) and employs at least some of the powers normally exercised by that government (§§67-73). In general, it should be evident that in view of the purposes and objects of human rights treaties, there is no *a priori* reason to limit a state's obligation to respect human rights to its territory. As Meron notes, "narrow territorial interpretation of human rights treaties is anathema to the basic idea..., which is to ensure that a state should respect human rights of persons over which it exercises jurisdiction". Thus the presumption is that the state's obligation continues where agents of the state – whether military or civilian – exercise power and authority over persons outside national territory ('The 1994 U.S. Action in Haiti: Extraterritoriality of Human Rights Treaties', 89 *AJIL* 78-82 (1995), at 80-82). On the margins it may be noted that the debate as to the ECHR's scope of applicability mirrors, to some extent, the dispute as to the applicability of multilateral conventions in 'non-metropolitan' and occupied territories. Israel's recalcitrance to submit to the supervisory procedures under the ILO Conventions is discussed by Theodor Meron, 'Applicability of Multilateral Conventions to Occupied Territories', 72 *AJIL* 542-557 (1978), at 544-551; for Israel's denial that the Fourth Geneva Convention applies *de jure* to the OPT, cf. Ardi Imseis, 'On the Fourth Geneva Convention and the Occupied Palestinian Territory', 44 *Harvard ILJ* 65-128 (2003).

area outside its national territory.<sup>885</sup>

Second, the problem may be re-stated as one of imputability. This is clearly more complex than the *ratione loci* issue. As regards the civil administration of territory, it is unlikely that UN member states (which are parties to the ECHR) are responsible for the actions of their nationals within UNMIK, as they do not exercise any degree of control. Concerning security tasks, CoE member states regularly contribute troops to the international security force operating in the territory. *Prima facie*, it may be argued that since national contingents of Convention States are exercising governmental authority over a people in an area over which they exercise control, there is every reason why they *should* carry responsibility for securing the human rights of these people.<sup>886</sup>

The limitations of the argument are, however, clear: NATO (in our case) is an organisation with an international legal personality distinct from that of its participating states.<sup>887</sup> It is therefore doubtful whether its 'organisational veil' could be pierced in order to hold individual states responsible for the acts of soldiers under KFOR's command and control. Since NATO is not a signatory of the ECHR, the latter's protection mechanism does not extend to individuals under its effective control. Solving the issue of imputability means asking the complex question to which extent military forces are indeed placed at the disposal of NATO and whether there exists a joint international authority which cannot be divided into separate jurisdictions. Naturally, each case must be examined as to whether the specific act was performed under the operational control of the organisation or the sending state. If control remains with the troop-contributing nation, it is critical to inquire whether individual human rights violations are committed within a CoE member state's genuine responsibility over a 'sector' of territory.<sup>888</sup> Responsibility could be established even in cases where the contingent

<sup>885</sup> As the ECtHR held in the case *Loizidou v. Turkey*, "the responsibility of Contracting states can be involved by acts and omissions of their authorities which produce effects outside their own territory" (No. 40/1993/435/514, Judgment of 18 December 1996, §52). The Court assumed such an extraterritorial applicability in the case of the occupation of northern Cyprus (*Cyprus v. Turkey* (No. 25781/94, 10 May 2001 (Judgment), §52), and recently in the case of the Russian influence, secured by the presence of Russian military, over the Moldavian Republic of Transdniestria (*Ilascu a.o. v. Moldova and Russia*, Appl. No. 48787/99, 8 July 2004, Judgment, §314). An argument that seeks to limit these findings to territories which "would normally be covered by the Convention" (*Banković*, *supra* note 47, at §80) could not exclude Kosovo since SCG, the holder of the formal title over the territory, has become a Contracting State (*supra*, note 856).

<sup>886</sup> Sarah Williams and Sangeeta Shah, 'Case Analysis. *Bankovic and Others v. Belgium and 16 Other Contracting States*', *EHRLR* 775-781(2002), at 781.

<sup>887</sup> As Zwanenburg concludes with reference to Tomuschat and Pellet, application of the 'objective' as well as the 'subjective' theory of international legal personality suggests that NATO is, indeed, an international legal person vested with functions distinct from those of the member states (*Accountability*, *supra* note 615, at 67).

<sup>888</sup> Cf. Heike Krieger, 'Die Verantwortlichkeit Deutschlands nach der EMRK für seine Streitkräfte im Auslandseinsatz', 62 *ZaöRV* 669-702 (2002), at 677-686. In *Banković*, the Court did not decide the question whether Member States of an international organisation could be held responsible for the acts of the latter. For the question of whether France and Britain were bound by the ECHR in the Allied occupation of Berlin, cf. Herbst, *Rechtsschutz*, *supra* note 871, at 53-64. The ECtHR may provide clarification in the case *Behrami v. France* which concerns the responsibility of French KFOR troops under Article 1 in respect of an alleged negligent failure to act (No. 71412/01 [pending], case communicated on 16 September 2003). The Court may look for jurisprudential guidance in the *Hess* decision in which the EComHR found that Spandau prison was established on the basis of a collective decision of the Kommandatura and that the subject of the complaint was a matter for which the Four Powers were jointly responsible. *Hess'* application was inadmissible because the joint authority could not be divided into separate jurisdictions; the Commission was without *ratione personae* (*Ilse Hess v. United Kingdom* [1975], No. 6231/73,

to which that member belongs is generally under the operational control of the organisation.<sup>889</sup>

Third, the problem can be viewed as one of granting an excessive array of privileges and immunities to international actors. As widely criticised by international scholars,<sup>890</sup> human rights NGOs<sup>891</sup> and international organisations both within and outside of Kosovo,<sup>892</sup> the rights of Kosovars to seek review of, and redress for, alleged violations of their rights by UNMIK and KFOR remain non-existent also due to the UN administration's functional immunity from the jurisdiction of the court system.<sup>893</sup> Such 'human rights vacuum' appeared as the UN Security Council instituted UNMIK and KFOR as legitimate authorities and as holders of *imperium* and in effect permitting them to perpetrate violations of the Convention in an extraterritorial setting which they could not perpetrate in any of the CoE member states.

The findings can be summarised as follows: by temporarily derogating from the FRY legal

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Decision of 28 May 1975, 2 DR 9, at 74). The extension of member state's 'jurisdiction' (in the meaning of Article 1 ECHR) to peace-building missions would certainly remove harmful inconsistencies in the protection against domestic and external acts of their state organs. However, it must be added that the accessibility of the Strasbourg Court would not close the human rights gap as many troop-contributing countries are not ECHR Contracting States. A discussion of the relationship of the ECHR to other norms of (customary) international human rights law is beyond the scope of this chapter.

<sup>889</sup> Zwanenburg considers the (hypothetical) situation that the Dutch contingent in Srebrenica received instructions from its government concerning the attitude it must take toward the transfer of the local population by Bosnian Serb forces: "If such were the case, the conduct of the contingent would be attributable to the government, even though the agreement between the Netherlands and the UN concerning the participation of Dutch troops in the operation specified that the UN was in command" (*Accountability*, *supra* note 615, at 111). The presumption that the conduct of troops that are an integral part of a peace support operation is attributable only to the international organisation, can be rebutted if it is established that the troops acted on behalf of a troop contributing state (at 132). As Hirsch points out, holding the contributing state responsible for acts of its troops without enabling that state to control the operation may, however, serve as a negative incentive to the participation of some states in international forces (*The Responsibility of International Organizations Toward Third Parties: Some Basic Principles* (Dordrecht: M. Nijhoff, 1995), at 77). On the other hand, he notes that sheltering member states from responsibility for acts committed by their forces under the 'veil' of an international organisation does not supply an incentive to prevent future violations (at 150).

<sup>890</sup> For a detailed critique of the inconsistent and non-transparent articulation of policy goals by UNMIK, its structural tensions with democratic governance and the lack of judicial review of its actions, see Marshall/Inglis, 'Disempowerment' *supra* note 837, at 106 *et seq.* and 144-145.

<sup>891</sup> Cf., e.g., Amnesty International, *Federal Republic of Yugoslavia (Kosovo): Setting the Standard? UNMIK and KFOR's Response to Violence in Mitrovica* (AI Index EUR 70/13/2000, March 2000).

<sup>892</sup> Cf. the various Reports by the OSCE Mission in Kosovo, Department of Human Rights and Rule of Law and especially its 'Remedies Catalogue'. For a critique of the opaque references to, and defective entrenchment of, international human rights law see Ombudsperson in Kosovo, *Certain Aspects of UNMIK Regulation No. 2000/59 Amending UNMIK Regulation No. 1999/24 on the Law Applicable in Kosovo* (27 October 2000), Special Report No. 2 (30 May 2001) as well as the report of the CoE Commissioner for Human Rights, Kosovo: *The Human Rights Situation and the Fate of Persons Displaced from their Homes* (Strasbourg, 16 October 2002 (CommDH (2002)11), at 48).

<sup>893</sup> UNMIK/REG/2000/47 *On the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo* (18 August 2000). Similar provisions on the immunity of World Bank personnel were laid earlier down in UNMIK/REG/2000/44 *On the Privileges and Immunities of the World Bank Group and Its Officials in Kosovo* (10 August 2000). The amount of literature devoted to the incompatibility of UN immunity rules with international human rights law is steadily increasing. See, e.g., Frederick Rawski, 'To Waive or Not To Waive: Immunity and Accountability in U.N. Peacekeeping Operations', 18 *Connecticut JIL* 103 (2002), at 124 *et seq.*; Cerone, 'KFOR Accountability', *supra* note 681; and the Kosovo Ombudsperson Institution's *Special Report No. 1*, *supra* note 608.

order, the Security Council removed from individuals the benefit of the ECHR's fundamental safeguards and their right to call a state to account for violation of their rights in proceedings before the Court.<sup>894</sup> Not without a sense of sarcasm, the Kosovo's Ombudsman pointed out that the UN has placed a people under its control, "thereby removing them from the protection of the international human rights regime that formed the justification for UN engagement in Kosovo in the first place".<sup>895</sup> This state of affairs is even more disturbing when mirrored against decisions of the UN Human Rights Committee which, in the wake of massive human rights violations committed in the territory of the former SFRY, concluded that citizens should not be deprived of the benefits deriving from the application of the international human rights instruments simply because the State was dissolving. The argument can also be fortified from the position of human rights case law, in particular by applying the equal protection test devised by the EComHR and further developed by the ECtHR.<sup>896</sup> Ironically, the UN Secretary General – the constitutional "guardian of the principles of the Charter"<sup>897</sup> – has, through the actions of his subsidiary organ (the SRSG in Kosovo), become notorious for the illegal detention of persons at a time when many of the UN member states, and Annan himself, have raised serious concerns about the United States' detention practices at Guantánamo.<sup>898</sup>

As Knaus and Martin recently noted with regard to the competencies of the OHR, a state-

<sup>894</sup> Adapted from *Cyprus v. Turkey*, *supra* note 885, at §78. The case is discussed by Frank Hofmeister, 'International Decisions', 96 *AJIL* 445-452 (2002) and Loukis G. Loucaides, 'The Judgment of the ECtHR in the Case of *Cyprus v. Turkey*', 15 *LJIL* 225-236 (2002).

<sup>895</sup> *Second Annual Report 2001-2002* (Prishtina, 2002), at 5.

<sup>896</sup> Cf. *M. & Co. v. Federal Republic of Germany* [1990], EComHR, 9 February 1990 (Decision), 33 *Yearbook of the ECHR* 46 (1990), at 52: "[t]he transfer of powers to an international organisation is not incompatible with the Convention provided that within that organisation fundamental rights will receive an equivalent protection". Similar: *Matthews v. United Kingdom* [1999], ECtHR, No. 24833/94, 18 February 1999 (Judgment), 42 *Yearbook of the ECHR* 78 (1999), at §32. State responsibility could hence derive from the transfer of command/control over a national contingent to the UN or NATO without ensuring that those powers are exercised in conformity with the member state's international obligations (Cf. Zwanenburg, *Accountability*, *supra* note 615, at 133).

<sup>897</sup> Cf. Javier Pérez de Cuéllar, 'The Role of the UN Secretary-General', in *United Nations, Divided World: The UN's Roles in International Relations* 125-142 (ed. by A. Roberts and B. Kingsbury, 2<sup>nd</sup> ed., Oxford: Clarendon Press, 1993), at 126. For an argument tying the UNSG to a 'sacred trust' to secure within the limits of his powers the observance of UN principles, see Charles H. Alexandrowicz, 'The Secretary-General of the United Nations', 11:4 *ICLQ* 1109-1130 (1962), at 1127, and, more recently, Ian Johnstone, 'The Role of the UN Secretary-General: The Power of Persuasion Based on Law', 9 *Global Governance* 441-458 (2003), at 444-5. Cf. also the SG's stated intention to 'mainstream' human rights – "integral to the promotion of peace and security" – throughout the UN system (*Renewing the United Nations*, *supra* note 513, at §78).

<sup>898</sup> Cf. Agence France Presse, 'Guantanamo: Annan Warns of Abuse of T-Word' (30 January 2004). UNMIK has on several occasions carried out preventive detentions, arguing that an individual poses a threat to public safety and order. Furthermore, the SRSG has issued a number of Executive Orders extending detention periods without specifying the grounds for the continued detention, and without providing the detainee with an opportunity to challenge the lawfulness of the decision. The Kosovo Ombudsperson found that the absence of judicial control over deprivations of liberty imposed under those Executive Orders constituted a clear violation of the ECHR (*Special Report No. 3: On the Conformity of Deprivations of Liberty under "Executive Orders" with Recognised International Standards* (Prishtina, 29 June 2001)). See also Amnesty International, *Federal Republic of Yugoslavia (Kosovo): Criminal Justice System Still on Trial* (AI Index: EUR70/063/2000), 22 November 2000) as well as Elisabeth Abraham, 'The Sins of the Saviour: Holding the United Nations Accountable to International Human Rights Standards for Executive Order Detentions in its Mission in Kosovo', 52 *American University LR* 1291 (2003). Cf. also the OSCE Mission in Kosovo's thematic *Review of the Criminal Justice System* (March 2002), at 43-49; its *Remedies Catalogue*, at 11-12 (both regarding SRSG's Executive Orders and extra-judicial detentions by KFOR) and their discussion by Stahn, 'Origins', *supra* note 516, at 152-154.

building mission that started out with unlimited powers to meet extraordinary circumstances may indeed end up as an uncomfortable caricature of a Utilitarian despot.<sup>899</sup> The frustration with the immunisation of law from democratic politics, the absence of institutions of constitutional control, and the concomitant deprivation of the effective protection of human rights standards has recently led the CoE Parliamentary Assembly to advance daring propositions. It suggested the establishment of a Human Rights Court for Kosovo with jurisdiction over complaints alleging violations of ECHR-protected rights by, among others, UNMIK, KFOR, and its national contingents. Moreover, it recommended to UNMIK the creation of a Special Chamber of Kosovo's Supreme Court with the jurisdiction to review "all Provisional Assembly laws *other than those which had been amended in promulgation by the SRSG* so as to bring them into conformity with international human right standards".<sup>900</sup>

This proposition is based on a fallacious dichotomy between laws that are promulgated by the SRSG in a 'blanket' manner and those which are promulgated subsequent to an amendment by the SRSG. It creates the assumption that SRSG amendments – of any nature presumably, even if only to clarify the literal meaning of a particular term used in an Assembly 'law' – would confer a seal of conformity with human rights instruments. This assumption is dubious. Such a Special Chamber would therefore be in a position to effectively charge the SRSG with failure to amend Assembly laws before promulgating them. While the idea of judicial review of normative acts of a UN territorial administration is nothing if not revolutionary, it is entirely unclear why, given the fact that the SRSG has to ensure compliance with international human rights standards, the CoE proposal draws a distinction between these two scenarios of promulgation.

## (II) THE PROBLEM OF NORM CONTROL: EXAMPLES FROM PALESTINE AND BOSNIA

The SRSG himself, accountable only to the UN Secretary-General through his Deputy in the New York Headquarters' DPKO in the form of periodic reporting exercises, is not bound by the provisions of the Constitutional Framework and can, in theory, revoke the granted powers and thus reverse the process of gradual transfer of competences to local institutions created under it.<sup>901</sup> In order to cement the hierarchy of norm-setting within the territory, the Framework vests the SRSG with *Kompetenz-Kompetenz*. He is, first, empowered to oversee the Provisional Institutions of Self-Government (PISG), its officials and agencies, even as they operate in their respective fields of 'transferred' powers (*autonomer Wirkungsbereich*), and is, second, authorised to take "appropriate measures" whenever their actions are inconsistent with Resolution 1244.<sup>902</sup> In practice, it has also not been uncommon for the UNMIK

<sup>899</sup> Knaus/Martin, 'Raj', *supra* note 8, at 73.

<sup>900</sup> CoE Parliamentary Assembly, Resolution 1417, *Protection of Human Rights in Kosovo* (25 January 2005), §4(b) and §5(b) (italics supplied). The proposal is based on the Report of the Venice Commission, *Opinion*, *supra* note 616, at 22 *et seq.*, with reference to the BiH Human Rights Chamber.

<sup>901</sup> The CF's preamble clearly expresses the retention of the overall decision-making power by the SRSG: "[t]he exercise of the responsibilities of the [PISG] shall not in any way affect or diminish the ultimate authority of the SRSG for the implementation of UNSCR 1244(1999)". According to an O/SRSG working paper, the reversion of competencies to UNMIK remains a punitive option, along with the reversal of a certain decisions, the withholding of funds by UNMIK, and the removal of officials from office, and, as a measure of last resort, their criminal prosecution (O/SRSG Working Document, *Types of Intervention*, 17 February 2003, on file with the author).

<sup>902</sup> Chapter 12 of the CF, *supra* note 618. Cf. also the wide-ranging interpretation by the UNSG of the SRSG's legislative powers: In exercising the authority vested in UNMIK, the SRSG "may change, repeal or suspend existing laws to the extent necessary for the carrying out of his functions, or

SRSg to intervene in the legislative process of the PISg and refuse to promulgate laws that, upon advice from UNHQ in New York, were deemed to be in violation of Resolution 1244 and the Constitutional Framework.<sup>903</sup> He has nullified resolutions of the Kosovo Assembly considered to be beyond the scope of its competencies.<sup>904</sup> Moreover, powers of intervention were exercised through executive decisions to set aside inter-ministerial agreements with other states<sup>905</sup> as well as decisions of municipalities<sup>906</sup> and decisions of the local executive taken within the scope of their competence.<sup>907</sup> The SRSg even held a decision of a local court to be null and void as it disregarded applicable law.<sup>908</sup>

Exercising his unlimited power to review the constitutionality of, and annul, laws adopted by the local legislature, the SRSg can be said to act as 'negative legislator'.<sup>909</sup> No other institutional checks and balances or extra-organisational normative controls are envisaged. Under the current legal framework, the SRSg is neither accountable to the local institutions, nor subject to any control exercised by them.<sup>910</sup> In particular, legislative acts issued by the SRSg – both Regulations and Administrative Directions as well as other subsidiary instruments issued by one of UNMIK's four 'pillar' components – are exempt from the jurisdiction

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where existing laws are incompatible with the mandate, aims and purposes of the interim civilian administration" (*Report of the Secretary-General* (12 July 1999), *supra* note 600, at §39).

<sup>903</sup> E.g., the Law on Higher Education (2002/3), adopted by the Assembly on 25 July 2002. The law was not promulgated by the SRSg pursuant to his authority under the Constitutional Framework, which provides that "[l]aws [passed by the Assembly] shall become effective on the day of their promulgation by the SRSg, unless otherwise specified" (s.9.1.45). During its 3 April 2003 plenary session, the Assembly contended that "UNMIK is selectively implementing" a law and took the position that all parts of the PISg and the university shall implement the provisions of the law regardless of whether the law has been promulgated by the SRSg (see OSCE Mission in Kosovo, *Spot Report on the Monitoring of the Assembly of Kosovo* (4 April 2003, on file with the author)).

<sup>904</sup> E.g., the Assembly 'Resolution' on the 'Values of the Liberation War of Kosova' (15 May 2003). In a previous instance, the Assembly had issued a 'Resolution' challenging the border agreement between the FRY and the FYRoM ('Territorial Integrity of Kosova', of 23 May 2002). The SRSg declared that this Resolution violated the Constitutional Framework and the UN Security Council issued a strong condemnation ('Security Council Deplores Kosovo Assembly's Resolution Concerning the Province's Territorial Integrity', UN/Press Release/SC/7413, of 24 May 2002). For the background to this particular incident, cf. the discussion *supra* p. 200.

<sup>905</sup> E.g., Memorandum of Understanding between the Ministry of Economy and Finance of Kosovo and the Ministry of Economy of Albania (30 May 2002), declared void by SRSg Steiner in a letter to the Kosovo's PM on 25 June 2002.

<sup>906</sup> Cf., e.g., UNMIK/ED/2004/8 *On Setting Aside Provisions in the Municipal Regulation No. 2000/1 of the Municipal Assembly of Mitrovicë/Mitrovica of 20 February 2004* (8 April 2004). Based on s.47(2) of UNMIK/REG/2000/45 *On Self-Government of Municipalities in Kosovo* (11 August 2000), the SRSg has the authority to set aside any decision of a municipality which he considers to be in conflict with S/RES/1244 or the applicable law or which does not take sufficiently into account the rights and interests of 'communities' (i.e. minorities).

<sup>907</sup> In a case that aroused considerable excitement, the SRSg, in late 2004, cancelled the decision of the Telecommunication Regulatory Authority (TRA) to select the Slovenian company Mobitel as Kosovo's second cell phone operator after a tender process that it had conducted under the authority explicitly delegated to it (cf. UNMIK/ED/2004/25, 20 October 2004).

<sup>908</sup> On the same issue, UNMIK declared that the subsequent decision of Prishtina Municipal Court requiring the TRA to execute the agreement with Mobitel would be without legal basis and "not enforceable" as the Court "disregarded the applicable law in Kosovo, as established by Executive Decision of the SRSg" (UNMIK Press Briefing Notes, 23 March 2005).

<sup>909</sup> Adapted from Kelsen, *Law and State*, *supra* note 843, at 268-269.

<sup>910</sup> The Constitutional Framework limits the jurisdiction of the Special Chamber of the Supreme Court on Constitutional Framework Matters to the control of laws adopted by the Kosovo Assembly and to disputes among the provisional institutions (Chapter 9.4.11).

of local or international courts.<sup>911</sup> The absence of a Constitutional Court means that no tribunal in Kosovo's legal system of Kosovo could give an authoritative ruling on, e.g., the discriminatory nature of a law or the (non-)compatibility of legislative and executive acts by UNMIK organs with higher sources of law. Only the Ombudsperson<sup>912</sup> may examine claims concerning an abuse of authority by UNMIK. Crucially, the lack of a Constitutional Court implies that there is no independent institution to ensure the coherence of the temporary legal order. The gap in mechanisms of independent constitutional guardianship, which assumed such centrality in democratic revival elsewhere,<sup>913</sup> means that judicial activism in internationalised territories will be slow to enforce constitutional understandings. It can only belatedly insinuate itself into the foreground of politics by transforming public policy disputes into questions of constitutional interpretation.<sup>914</sup>

In order to illustrate the fundamental *problématique* of the rule of law in an internationalised territory – a territory which is temporarily governed under the 'sacred trust of civilisation' – consider two examples drawn, firstly, from the governance of Palestine under the League of Nations Mandate system and, secondly, from Bosnia under international tutelage.

In 1925, the High Commissioner for Palestine, acting under the Palestine Order-in-Council (1922), enacted an Ordinance authorising the Municipality of Jerusalem to draw water from

<sup>911</sup> This can be derived from UNMIK/REG/1/1999/1, *supra* note 598, which stipulates that UNMIK Regulations "shall remain in force until repealed by UNMIK or superseded by such rules as are subsequently issued by the institutions established under a political settlement" (s.4). Perritt notes that the only concrete mechanism for judicial review of decisions by the 'political trustee' is the Special Chamber of the Kosovo Supreme Court which has jurisdiction to review decisions taken by the privatisation agency KTA ('Judicial Review', *supra* note 720, at 8. While this observation is accurate, it is also incomplete. Some UNMIK Regulations provide for different kinds of appeal. In the area of pharmaceutical products, a decision of the Pharmaceuticals Appeals Board (a hybrid body composed of international and local members appointed by the SRSG) to refuse, suspend, revoke or terminate a license can be appealed to the courts (UNMIK/REG/2000/52 *On the Import, Manufacture, Sale and Distribution of Pharmaceutical Products, Including Narcotic Drugs and Psychotropic Substances* (2 September 2000), s.13). Similar procedures for administrative review are foreseen in UNMIK/REG/2000/20 *On Tax Administration and Procedures* (12 April 2000) (s.7 provides for appeal to the Independent Review Board and further appeal to a court); S.9(5) of UNMIK/REG/2003/23 *On Excise Taxes on Tobacco Products in Kosovo* (25 June 2003) provides for appeal against the decision of, or a penalty imposed by, the Director-General of UNMIK's Customs Service; S.4(4) of UNMIK/REG/2000/8 *On the Provisional Regulation of Businesses in Kosovo* (29 February 2000) provides for appeal against a decision on denial of the registration of a business. In the field of electronic media regulation, sanctions imposed by the Temporary Media Commissioner or his decision to refuse to issue a broadcast license can be appealed to the Media Appeals Board (s.4(3) of UNMIK/REG/2000/36 *On the Licensing and Regulation of the Broadcast Media in Kosovo* (17 June 2000)), a quasi-judicial body comprised of two international and a local judge.

<sup>912</sup> UNMIK/REG/2000/38 *On the Establishment of the Ombudsperson Institution in Kosovo* (30 June 2000) authorises the Ombudsperson Institution (OI) to "receive and investigate complaints from any person or entity in Kosovo concerning human rights violations and actions constituting an abuse of authority by the interim civil administration" (s.3.1). It would, however, be mistaken to conclude that the OI exercises a degree of constitutional restraint over the supreme authority of the SRSG; it may adopt decisions in the form of recommendations which do not bind the SRSG. The latter also appoints the Ombudsperson and can remove him from office (s.6.2 and 8).

<sup>913</sup> For the case of Estonia see, e.g., Nancy Maveety and Anke Grosskopf, "Constrained" Constitutional Courts and Conduits for Democratic Consolidation', 38:3 *Law&Society Review* 463-488 (2004), at 469 *et seq.*

<sup>914</sup> Cf. Lee Epstein, Jack Knight and Olga Shvetsova, 'The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government', 35 *Law&Society Review* 117-163 (2001), at 123.

the spring of a neighbouring village (subject to certain rights of compensation) in order to increase Jerusalem's water supply. The village's inhabitants applied to the Supreme Court of Palestine for an injunction to restrain the local authorities from taking water. They claimed that the Ordinance contradicted Article 2 of the 'A' Mandate for Palestine stating that "the Mandatory shall be responsible for...safeguarding the civil and religious rights of all the Inhabitants of Palestine, irrespective of race and religion".<sup>915</sup> The Supreme Court held that the provisions of the Ordinance concerning the compensation to be paid to villagers were indeed contrary to the Mandate and declared the Ordinance *ultra vires*. On appeal by the Government of Palestine, the Judicial Committee of the Privy Council (competent to hear the case under the 1890 Foreign Jurisdiction Act) revised this decision on the grounds that the Supreme Court had misconstrued Article 2 of the Mandate. However, it confirmed that the Court was competent to consider the compatibility of any Ordinance issued by the Government of Palestine with the Mandate, and to declare it null and void if necessary. What renders this decision remarkable is not only that the Mandate was held to be enforceable in a municipal court.<sup>916</sup> The judgment also encapsulates what we intend to demonstrate as we establish a linkage between the abstract notion of legality and that of judicial scrutiny of international legislation with territorial reach.

A decision by the Constitutional Court of Bosnia and Herzegovina (BiH) further elucidates the issue of the hybrid sources of law and the interference of international legal forms with a domestic normative order.<sup>917</sup> In 2000, the Court, held that the High Representative (HR), as "final authority in theatre" and charged with the overall implementation of the Dayton Peace Agreement,<sup>918</sup> acts both as a national 'agent' of BiH and as an organ of the inter-state Peace Implementation Council (PIC) when adopting decisions in the form of the national law of BiH. In its deliberation on the admissibility of the case, it referred to the cases of Germany and Austria placed under international administration after WWII. The Court suggested that:

foreign authorities acted in these States on behalf of the international community, substituting themselves for the domestic authorities. Acts by such international authorities were often passed in the name of the States under supervision. Such situation amounts to a sort of functional duality: an authority of one legal system intervenes in another legal system, thus making its functions dual. The same holds true for the High Representative: he has been vested with special powers by the international community and his mandate is of international character. In the present case, the High Representative...intervened in the legal order of [BiH] substituting himself for the national authorities. In this respect, he therefore acted as an

<sup>915</sup> Cf. the *District Governor Jerusalem-Jaffa District and Another v. Suleiman Murra and Another Case (The Urtas Springs case, 3 AD no. 32, 1925-1926)*. The case is presented in Erades, *Interactions*, *supra* note 450, at 736.

<sup>916</sup> For case law qualifying the scope of application of this judgment see *ibid.*, at 737-38.

<sup>917</sup> The discussion here draws significantly from earlier conclusions reached in connection with the 'dual functions' of an international administration. In order to recapitulate, a temporary fiduciary administration acts both as international *organ* and as *agent* of the territory under its tutelage.

<sup>918</sup> *Supra* note 89, Annex 10 Article V. At the margins it may be added that the BiH Constitution itself represents a hybrid instrument as it is annexed to the GFAP, Annex 4. The Framework Agreement is a basket containing a complex amalgam of bi- and trilateral treaties which has, in turn, been endorsed by S/RES/1031 (15 December 1995), UN Doc. S/RES/1031 (1995). For three compelling analyses see Dörr, 'Dayton/Ohio', *supra* note PP, at 140 *et seq.*; Edin Šarčević, 'Völkerrechtlicher Vertrag als „Gestaltungsinstrument“ der Verfassungsgebung: Das Daytoner Verfassungsexperiment mit Präzedenzwirkung?', 39 *AdV* 297-339 (2001); and Carsten Stahn, 'Die verfassungsrechtliche Pflicht zur Gleichstellung der drei ethnischen Volksgruppen in den bosnischen Teilrepubliken – Neue Hoffnung für das Friedensmodell von Dayton?', 60 *ZaöRV* 663 (2000), at 668-674.



authority of [BiH] and the law which he enacted is in the nature of national law and must be regarded as a law of [BiH].<sup>919</sup>

In an apparent application of Scelle's doctrine of *dédoublement fonctionnel* in which national organs are seen to function either as national or as international agents,<sup>920</sup> the Court further concluded that irrespective of the nature of the powers vested in the HR, the law promulgated by him would be local in character if it related to a field falling within the legislative competence of the BiH legislature. Hence, "[t]he competence of the...Court to examine the conformity with the Constitution...of the Law...enacted by the High Representative acting as an institution of [BiH] is...based on...the Constitution."<sup>921</sup>

Several aspects of this decision are striking. The judgment supports our conclusions put forward in Chapter IV, namely concerning an international agent's 'split' identity and its performance of dual functions. Secondly, the judgment helps us to advance the argument relating the hybrid nature of the legal regime under (partial) international administration. Initially, the Court appears to have followed the exegesis developed by the *Badischer Staatsgerichtshof* shortly after WWII in which it subscribed to the material distinction between state- and occupation law. In a series of noteworthy judgments, the Court had investigated the nature of local administrative law that was, "in reality, occupation law disguised the garment of Baden law", ordered to take effect by the *Contrôle de la Sécurité*.<sup>922</sup> While the *Staatsgerichtshof* declared itself incompetent to review administrative acts whose material content derived from an Allied legal source,<sup>923</sup> the Bosnian Constitutional Court

<sup>919</sup> Case No. U 9/00 (*Request for Evaluation of Constitutionality of the Law on State Border Service*), Constitutional Court of BiH (Banja Luka, 3 November 2000), §5 *et seq.*. For an admirably sensible discussion of the case and its qualification in the light of the subsequent *Bičakčić* case (U 37/01), see Christian Steiner and Nedim Ademović, 'Kompetenzstreitigkeiten im Gefüge von Dayton', in *Bosnien-Herzegowina im Horizont Europas* 109-147 (ed. By W. Vitzthum and I. Winkelmann, Berlin: Duncker&Humblot, 2003), at 120-127. .

<sup>920</sup> Cf. Chapter IV, *supra* p. 124. The case of Allied occupation of Germany and the dual functions exercised by the Control Council were discussed in the same chapter (*supra* p. 131).

<sup>921</sup> Case No. 9/00, *supra* note 919, §§6 and 9.

<sup>922</sup> Judgment of the *Badischer Staatsgerichtshof*, Freiburg (St.G.H. 2/48, 15 January 1949), synopsis reprinted in 75:4 *AdV* 477 (1945), at 480. In this judgment, the *Staatsgerichtshof* was called upon to pronounce itself on the legality of a regulation issued by the Ministry of Interior of Baden through which a local administrative body (*Landratsamt*) had ordered the sequestration of a car that was initially removed by an Allied (French) soldier. The Ministry argued that the regulation was based on the order of the military government which is directly applicable law of occupation (*unmittelbares und ausschließliches Besatzungsrecht*) and as such not susceptible to judicial review. Similar were the conclusions reached in its judgment St.G.H. 3/48 (27 November 1948): "Stellt die Anordnung...ihrer äußeren Form nach badisches Recht, ihrem materiellen Inhalt nach aber Recht der französischen Militärregierung dar, so ist sie einer Nachprüfung durch den *Staatsgerichtshof* entzogen.... Die Bad. Verfassung kann....nicht den Maßstab für die Gültigkeit von Besatzungsrecht abgeben. Dieses letztere bemißt sich allein nach völkerrechtlichen Gesichtspunkten und auf einer völkerrechtlichen Ebene, die dem *Staatsgerichtshof* verwehrt ist" (*ibid.*, 486). See also the judgments St.G.H. 3/49 (31 August 1949), holding that the Court would be competent to review an administrative act since its material content was not derived from occupation law (*ibid.*, at 487 *et seq.*, and their critical discussion by Schneider, 'Mittelbares Besatzungsrecht', *supra* note 870).

<sup>923</sup> St.G.H. 2/48, 15 January 1949, reprinted *id.*, at 479. These judgments are in line with established practice of municipal courts during occupation which are "reluctant to inquire whether legislative measures which *prima facie* could be intended to safeguard public order, and thus to satisfy the requirements of Article 43 of the Hague Regulations, were in fact necessary. They have considered themselves bound by them" (Felice Morgenstern, 'Validity of the Acts of the Belligerent Occupant', 28 *BYIL* 291-322 (1951), at 306, with further references).

significantly departed from this reasoning.

In the present case it held that acts of the HR are susceptible to judicial review as *acts of the government* of BiH.<sup>924</sup> The judgment, which one commentator termed the "Bosnian version of... *Marbury v. Madison*",<sup>925</sup> essentially suggests that laws imposed by the organ of the international community that lay within the competence of the local institutions had the same constitutional status as ordinary legislation. HR-imposed legislation would, according to the Court, be required to comply with the Constitution, at least in so far as it concerned the federal distribution of powers, and would be subject to review by the Court. It follows from the decision of the Court that such acts of *Ersatzvornahme* may, like any other national laws, be challenged by the organs listed in the BiH Constitution.<sup>926</sup>

Whatever the merits of the dictum in Case No. U 9/00, the wider point here is that the 'legality' of a rule is established by showing that it conforms to tests of validity laid down by some other rules of a legal order. These tests normally concern the way the rule was enacted or laid down by a judicial authority.<sup>927</sup> In the formalist understanding adopted here, a norm's legality attaches to its particular institutional configuration, not only with regard to its existence (validity) but notably as regards the possibility of its institutional invalidation. A voidable act is thus an act that produces all its effects in spite of any defects by which it is vitiated, as long as it is not annulled by the competent organ. Legality hence denotes a rule's relation to a hierarchy of norms and its reference to the modes through which it is validated and invalidated. These clarifications are important as they allow us to conclude that legality is an intelligible concept only to the extent to which it presupposes concrete avenues for challenging laws on grounds of their formal invalidity and incompatibility with higher sources of law (systemic validity).<sup>928</sup>

<sup>924</sup> Cf. Wilde, 'Complex Role', *supra* note 813, at 255.

<sup>925</sup> Stahn, 'Origins', *supra* note 516, at 167.

<sup>926</sup> Steiner/Ademović paraphrase the findings of the Court in the following way: "Wann der HR eingreifen sollte, unterliegt seinem gerichtsfreien Beurteilungsspielraum. Nur: Wenn er handelt, muss er sich an die Verfassung halten... Handelt der HR als Gesetzgeber, so bedient er sich [der Kompetenzen der innerstaatlich zuständigen Körperschaften und Organe], muss sich im Ergebnis... dann aber auch an die verfassungsrechtlichen Vorgaben halten... Mit dem Gesetz darf der HR... weder Kompetenzvorschriften... noch... materielles Verfassungsrecht verletzen..." ('Kompetenzstreitigkeiten', *supra* note 919, at 123-24 and 125). In this case, however, the Court declined the competence to review the 'exercise' of the High Representative's powers, leaving him full discretion over when and how to intervene in the legislative process. De Wet's conclusion that the "potential for an uncontrolled exercise of power by the Security Council (through the High Representative) is not as acute as in Kosovo or East Timor" is untenable (*Chapter VII Powers*, *infra* note 931, at 315). The case No. U 25/00 of 23 March 2001 is also of interest in this context. There, the applicants suggested that the HR could not amend the *Law on Travel Documents (zakon o putnim ispravama)* by a decision, since a decision represents an act of 'weaker' legal force than laws. The BiH Constitutional Court re-stated its conclusions of the case No. U 9/00, namely, that its power of review extended to decisions of the HR if he substituted for the BiH Parliamentary Assembly: "the laws enacted by him have the character of domestic laws and are to be considered the laws of Bosnia and Herzegovina" (§22, to which §29 refers).

<sup>927</sup> Raz, *Authority of Law*, *supra* note 809, at 150-51.

<sup>928</sup> Cf. Osieke who discusses mechanism that international organisations utilise to make some of their decisions reviewable – i.e., the decisions of the International Civil Aviation Organization which are, according to Article 84 of the Chicago Convention, appealable to the ICJ ('The Legal Validity of Ultra Vires Decisions of International Organizations', 77 *AJIL* 239-256 (1983), at 243). For a brief comparison of the review procedures foreseen in the Constitution of the Free City of Danzig, the draft Statutes of the City of Jerusalem, the Free City of Trieste, the constitutional arrangements of

The paucity of conceptions as to how the powers of an international administration could possibly be limited and scrutinised<sup>929</sup> implies that references to the notion of 'legality' in an internationalised territory remain tricky. If the Security Council is the authority from which the legal order in an internationalised territory emanates, how can a UN organ – which derives its legal position from the delegating institution – be subject to it? Unless we posit that one of the principal organs of the UN can, itself, act in contradiction to international norms,<sup>930</sup> its subsidiary organ UNMIK is, by definition, vested with the 'power' of legality. Its actions are actions of the UN Secretary-General and accrue to him. Beyond command and control over the Mission on the ground, he exercises a power of authoritative interpretation over the competencies delegated to him and is accountable only to the Security Council, the ultimate warden of legality in the current international system whose pronouncements, legal or otherwise, are not open to independent judicial review.<sup>931</sup>

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Kosovo, East Timor, BiH, the City Municipality of Mostar, and the District of Brčko see Salamun, *Democratic Governance*, *supra* note 610, at 189-199.

<sup>929</sup> In this regard see, e.g., the rather disappointing chapter by Bothe and Marauhn discussing the limitations of Trusteeship administrations: 'UN Administration', *supra* note 601, at 235-239. For fresh suggestions as to the introduction of judicial review models to fit into the legal framework established by a political trustee cf. Perritt, 'Judicial Review', *supra* note 720, at 47 *et seq.* It is, however, necessary to stress that it would be very difficult to argue that an international territorial administration is under a general *legal obligation* to accept judicial review of its acts, even when it is in the position analogous to an occupant. Although we may discern a tendency toward admitting the review of measures taken by a military occupant, such a right to control cannot be considered as a rule of customary international law, mainly because the evidence for a corresponding *opinio iuris* of the occupying power to consider itself bound by such rule is insufficient (see Herbst, *Rechtsschutz*, *supra* note 871, at 77).

<sup>930</sup> This question re-positions the problem of the auto-obligation of the state that played a fundamental role in German jurisprudence. See Kelsen, *Law and State*, *supra* note 843, at 197 *et seq.* The far-reaching competences of the SC have led some scholars to the conclusion that the UN is not *eo ipso* bound by general international law (custom and general principles) when acting under Chapter VII (Kelsen, *United Nations*, 1950, *supra* note 105, at 294: "The purpose of the enforcement action...is not: to maintain or restore the law, but to maintain, or restore peace, which is not necessarily identical with the law"). See also Albert Bleckmann, 'Zur Verbindlichkeit des allgemeinen Völkerrechts für internationale Organisationen', 37 *ZaöRV* 107 (1977), at 120. Since the UN is not a party to human rights treaties, it has no obligations under them. This follows from Art. 34 of the 1986 Convention on Treaties between States and International Organizations and between International Organizations (25 *ILM* 543 (1986), at 564). Treaties may affect the conduct of the UN, however, as codification of a general principle of law or declaratory of state practice in the formation of customary international law (see generally Christopher Greenwood, 'International Humanitarian Law and United Nations Military Operations', in 1 *YIHL* 3-34 (1998), with bibliography, and Marten Zwanenburg, 'Compromise or Commitment: Human Rights Obligations and International Humanitarian Law Obligations for UN Peace Forces', 11 *LJIL* 229 (1998), at 234 *et seq.*) It is, in any case, now generally accepted that at least UN forces are bound by humanitarian law (cf. Brian D. Tittmore, 'Belligerents in Blue Helmets: Applying International Humanitarian law to United Nations Peace Operations', 33 *Stanford JIL* 61 (1997), at 107, and Ray Murphy, 'United Nations Military Operations and International Humanitarian law: What Rules Apply to Peacekeepers?', 14 *Criminal Law Forum* 153 (2003), at 154 *et seq.*). The (internally) binding Bulletin 'Observance by United Nations Forces of International Humanitarian Law', setting out the applicability of fundamental rules and principles to all forces deployed under the auspices of the UN, has not entirely resolved the issue. It only covers forces "when in situations of armed conflict they are actively engaged therein as combatants..." (s.1.1, UN Doc. ST/SGB/1999/13, 6 August 1999, reprinted in 38 *ILM* 1656 (1999)). Institution-building activities are clearly not covered. On the bulletin in general, cf. Daphna Shraga, 'UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operation-Related Damage', 94 *AJIL* 406 (2000) and Marten Zwanenburg, 'The Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law: Some Preliminary Observations', 5 *International Peacekeeping* 133 (1999).

<sup>931</sup> For a comprehensive discussion of the legal considerations relating to the delegation of powers (based on Chapter VII of the UN Charter) by the SC to the SG to establish UN peace-keeping

To the extent that there are no institutional mechanisms available to allow for such determination, the 'legality' of what this chapter terms 'mediate United Nations law' is simply assumed and remains unverifiable from that position. As a normative act's nullity cannot be established, the determination of whether such an act conforms to higher sources of law is beyond the reach of constitutional discourse. It exceeds its concepts of different branches of government and the separation of power and is hence open to hermeneutic infinity.<sup>932</sup> Assessing the normative content of Resolution 1244 or acts adopted under it in terms of their 'legality' means that we are regularly thrown back into a circular argument that we must abruptly terminate as we invoke the last resort of the Security Council's extensive legal competence to interpret threats to international peace *legibus solutus*.<sup>933</sup>

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forces as subsidiary UN organs and the limitations to their exercise by the SG, cf. Sarooshi, 'Role of the SG', *supra* note 514, at 286-289. Whether the Security Council, in exercising its powers under the Charter, and particular under Chapter VII, is *eo ipso* subject to legal constraints imposed by general international law is subject to a lively discussion among scholars which cannot be replicated here. Cf., e.g., Jose E. Alvarez, 'Judging the Security Council', 90:1 *AJIL* 1-39 (1996) and Dapo Akande, 'The International Court of Justice and the Security Council: Is there Room for Judicial Control of Decisions of the Political Organs of the United Nations?', 46 *ICLQ* 309-343 (1997). For an original approach to the question through the application of the *estoppel* and the *implied duties* doctrines see August Reinisch, 'Das Jugoslawien-Tribunal der Vereinten Nationen und die Verfahrensgarantien des II. VN-Menschenrechtspaktes. Ein Beitrag zur Frage der Bindung der Vereinten Nationen an nicht-ratifiziertes Vertragsrecht', 47 *Austrian JPIIL* 173 (1995), at 185 *et seq.* See also Gill, 'Limitations', *supra* note 734, at 72-90 (*pro*), and Gabriël H. Oosthuizen, 'Playing the Devil's Advocate: The United Nations Security Council is Unbound by Law', 12 *LJIL* 549-563 (1999), at 562-563 (*contra*). For an examination whether, first, analogies between the UN Charter and domestic constitutions in relation to judicial review are permissible and, second, whether such emergent general principle of law in municipal orders could be transferred to the embryonic international constitutional order, see Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Oxford/Portland, Oregon: Hart Publishing, 2004), at 116-127. The lack of rules governing the accountability of an organ of an international organisation incidentally presents us with the flipside of a presumption that acts taken in fulfilment of a purpose of the United Nations are *intra vires* – a presumption that was initially intended to protect the functional decision-making autonomy of an international organisation. As the ICJ pointed out in the *Certain Expenses* opinion, "when an Organisation takes action which warrants the assertion that it was appropriate for the fulfilment of one of the purposes of the United Nations, the presumption is that such action is not *ultra vires*" (ICJ Reports [1962], *supra* note 192, at 158). The ICJ's pronouncement gave judicial expression to the original intentions of the drafters of the UN Charter who "consciously omitted any provision for judicial review, and regarded it as inevitable that each organ would interpret the provision of the Charter relating to its own functions" (Frederic L. Kirgis, 'Editorial Note: Security Council Governance of Postconflict Societies: A Plea for Good Faith and Informed Decision Making', 95 *AJIL* 579-582 (2001), at 580). The *intra vires* presumption, subsequently reaffirmed in broader terms by the ICJ and the ECJ, is deemed to apply more generally to institutional acts adopted in accordance with rules of procedure. See *Bowett's Law*, *supra* note 852, at 295, and the discussion in the subsequent section.

<sup>932</sup> For a distinct treatment of an act's legal status adopted in excess of authority, namely according to its reviewability or non non-reviewability, see Osieke, 'Legal Validity', *supra* note 928. A different perspective is held by Crawford who argues that judicial review exists in contentious cases because international organisations can affect the rights of States: "A court with jurisdiction to determine the rights of States will necessarily have to assess, for that purpose, the effects of decreases of international organizations, and no further mandate is required to do so" (*Marbury v. Madison* at the International Level', 36 *George Washington ILR* 505-514 (2004), at 512).

<sup>933</sup> Cf. Sean Murphy, 'The Security Council: Legitimacy and Collective Security After the Cold War', 32 *Columbia JTL* 201 (1994), at 248 *et seq.*, and, generally, Geoffrey R. Watson, 'Constitutionalism, Judicial Review, and the World Court', 34 *Harvard ILJ* 1-45 (1993). A judicial review function for the ICJ was discussed at the San Francisco Conference (at which the Charter and the ICJ Statute were negotiated) and the decision was made not to confer it. For reference to the Security Council's broad discretion and its 'limitation' by *bona fide* considerations see also Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford: OUP, 1995), at 220. The SC's absolute power to render such determinations has been somewhat qualified by the ICJ in its two (virtually identical) 1998 judgments on preliminary objections in the *Lockerbie* cases (*Questions of*

A local machinery of unaccountability in an internationalised territory which even resisted, until 2002, a systematic review of all draft legislation by human rights law experts,<sup>934</sup> is, as one commentator notes, matched at the international level, as "none of the international judicial scrutiny mechanisms can hear complaints brought against the international actors involved arising out of their conduct of territorial administration."<sup>935</sup> Unless it is meant to address infinity, *Iuvenalis'* question *sed quis custodiet ipsos custodes?* (*Saturae* VI, 347) must hence be aborted as it turns on itself and on what Judge *Shahabuddeen* termed the "equilibrium of forces underpinning the structure of the United Nations within the evolving international order".<sup>936</sup> Alternatively, it shall be answered with positivist triviality: 'no one'.

### (III) THE 'WRONGFULNESS' OF AN INTERNATIONAL ADMINISTRATION'S ACT

It has been claimed that the 'principle' of legality certainly applies to international organisations, irrespective of whether any review or sanction mechanism has actually been created or referred to within an organisation.<sup>937</sup> This proposition is too general to assist us in the formulation of the problem of non-reviewability. With *Osieke* we suggest that the legal status of an act or a decision adopted by an international organisation will depend to a large extent on whether there exists, in fact, the possibility for scrutiny.<sup>938</sup> Absent such mechanisms, the search for alternate modes of accountability prompts us to reach past the validity of normative acts and to hold the norm-producing body responsible itself. There are two areas in which arguments about the putative responsibility of an international territorial administration for 'wrongful' acts could advance the notion of accountability: (i) the 'organic' relationship between it and its mother organisation on the one hand, and (ii) the agency relationship it

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*Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States)*, ICJ Reports [1998] 115, reprinted in 37 *ILM* 587 (1998), at 604-5 (§§39-44)). Cf. Bernd Martenczuk, 'The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?', 10 *EJIL* 517-547 (1999), at 544-46; Schweigman, *Security Council*, *supra* note 7, at 244-260; Michael J. Matheson, 'ICJ Review of Security Council Decisions', 36 *George Washington ILR* 615-622 (2004), at 621-622. See also the *Tadić* case in which the Appeals Chamber of the ICTY – erroneously – found that its inherent 'incidental' power to determine the propriety of its own jurisdiction (competence-competence) permitted review of the legality of the Security Council's action in establishing the Tribunal (*Prosecutor v. Dusko Tadić*, Case No. IT-94-AR72, 2 October 1995, reprinted in 35 *ILM* (1996), at 32, §18).

<sup>934</sup> The OSCE Mission in Kosovo proposed the creation of a high-level 'Human Rights Oversight Committee' tasked to vet UNMIK legislation in the drafting stages (OSCE Interoffice Memorandum to the Legal Adviser to the UNMIK SRSG, of 24 April 2002, on file with the author). The Committee assumed its work in June 2002.

<sup>935</sup> Ralph Wilde, 'Accountability and International Actors in Bosnia and Herzegovina, Kosovo and East Timor', 7 *ILSA J. Int'l & Comp. L.* 455-460 (2001), at 456.

<sup>936</sup> *Libyan Arab Jamahiriya v. United States*, *supra* note 933, Request for the Indication of Provisional Measures, Order of 14 April 1992, ICJ Reports [1992] 114, at 142.

<sup>937</sup> See, e.g., Mohammed Bedjaoui, 'Du contrôle de légalité des actes du Conseil de sécurité', in *Nouveaux itinéraires en droit – Mélanges François Rigaux* (Brussels: Bruylant, 1993), at 93; Michael Bothe, 'Internationale Organisationen und das Rechtsstaatsprinzip', in *Das Menschenrecht zwischen Freiheit und Verantwortung. Festschrift für Karl J. Partsch* (ed. by J. Jekewitz et al., Berlin, 1989), 493-513, at 498 *et seq.*; and Chittharanjan F. Amerasinghe, *Principles of Institutional Law of International Organizations* (Cambridge: CUP, 1996), at 166.

<sup>938</sup> *Osieke*, 'Legal Validity', *supra* note 928, at 243 and 248-249 (also discussing the contrary view, namely that the attribution of *ultra vires* status of acts and decisions does not depend on a determination or declaration by a review body).

has assumed with regard to the entity under its temporary protection, on the other.<sup>939</sup>

The first area involves an inquiry into whether the organ has acted in accordance with the technical rules of its mandate. While the formal validity of an institutional act will be relatively easy to establish, debates over its substantive legality (breaches of obligations under international law or in *exès de pouvoir*)<sup>940</sup> or over lack of competence will be of a political rather than legal character. In the *Certain Expenses* opinion (1962), Judge Morelli argued that 'illegal' resolutions of United Nations organs were void *ab initio* (*ex tunc*), since invalidation did not exist in international law. An act's serious lack of conformity with a higher legal rule may constitute an absolute nullity, operating *ipso iure* so that the act produces no legal effects.<sup>941</sup> Deciding whether an agency decision is authorised by law necessitates review of statutory competence (and its opposite, *ultra vires* action), review of decisional rationality, and review of procedural regularity. Were UNMIK to act beyond its authority, purporting to bind Kosovo's institutions with obligations not necessary for implementation of its institution-building mandate, UNMIK, and derivatively the UN, may be held responsible.<sup>942</sup> However, since absolute nullity is the only form in which an act of the organisation can be invalid, there is, so to speak, no third option available to bridge the chasm between full validity and absolute nullity of an act.<sup>943</sup> This chasm appears particularly wide as the validity/nullity debate is "not tempered by the intervention of a more 'objective' actor, such as an international tribunal".<sup>944</sup>

<sup>939</sup> This draws upon the analysis of dual functionality undertaken in Chapter IV. It is appropriate at this point to clarify that 'responsibility' arises out of conduct which is internationally wrongful, whereas 'liability' denotes an obligation to compensate for the injurious consequences of conduct which is not necessarily wrongful. See Alan E. Boyle, 'State Responsibility and International Liability for Injurious Consequences of Acts not Prohibited by International Law: A Necessary Distinction?', 39 *ICLQ* 1-26 (1990) and Pierre-Marie Dupuy, 'The International Law of State Responsibility: Revolution or Evolution?', 11 *Michigan JIL* 105-128 (1989-90), at 109-118. The issue of extending the scope of international responsibility to international organisations (and particularly to those that assume temporary governmental powers on the basis of a Chapter VII authorisation) and to adapt the Draft Articles on State Responsibility (2001) in this respect has been repeatedly postponed by the ILC. Cf. note 954, *infra*.

<sup>940</sup> A *détournement de pouvoir* occurs where the grantee of a discretionary power exercises that power in the course of public administration, not in breach of any legislative provision, but for a purpose other than that contemplated in the grant (cf. J.E.S. Fawcett, 'Détournement de Pouvoir by International Organizations', 33 *BYIL* 311-316 (1957), at 311 (drawing a distinction between action *ultra vires*, as action stretching beyond the proper limits of the grant and *détournement de pouvoir* as action taken within those limits but for an improper purpose. This distinction, he argues, is particularly hard to make in the case of international agency)).

<sup>941</sup> Sep. op. Judge Morelli in the *Certain Expenses* opinion, *supra* note 303, at 221. See also *id.*, at 168.

<sup>942</sup> This example is drawn from Arsanjani's discussion of acts of the UN Council for Namibia in excess of its powers ('*Quis custodiet*', *supra* note 729, at 155-156).

<sup>943</sup> Cf. Karl Zemanek, 'Is the Security Council the Sole Judge of its Own Legality?', in *Liber Amicorum – Mohammed Bedjaoui* 629-645 (ed. by E. Yakpo and T. Boumedra, The Hague: Kluwer Law, 1999), at 642. See, on the other hand, Osieke who argues that ICJ jurisprudence and the law and practice of international organisations does not support the conclusion that substantive *ultra vires* acts and decisions are void *ab initio*, but only cease to give rise to binding legal obligations ('Legal Validity', *supra* note 928, at 244). A discussion of the distinction between substantive and procedural *ultra vires* acts is beyond the scope of this thesis.

<sup>944</sup> Bowett's Law, *supra* note 852, 293-294. An interesting idea, advanced by Perritt, involves the competence of the UN Office of Internal Oversight Services [Perry calls it the 'U.N. Inspector General'] to review the conduct of UN-established bodies ('Judicial Review, *supra* note 720, at 70-71). Whether the inspection functions of its Peacekeeping Audit Service could extend to include the review (in the administrative law sense) of decisions taken by a UN subsidiary organ *qua*

On the other hand, the legality discourse could be rendered more fecund by undertaking an investigation into the agency relationship an international organisation has assumed. In order to recapitulate the conclusions reached in Chapter III, we framed the relationship between a non-state territorial unit and its fiduciary administration as a relationship of agency and presented international agency as the foundation upon which the (limited) legal personality of a non-state territorial entity rests. We recognised that agency had been established, either by agreement between two subjects of international law, or, more commonly these days in the framework of multilateral peace-building missions, through the vertical imposition of compulsory agency *ex lege* by the UN Security Council. Following established rules of agency, acts performed by the agent within the limits of its internationally conferred authority bind the entity as if they had been performed by the latter. When acting within its power, the agent assumes no responsibility toward either the 'principal' or third parties. As a corollary, however, the agent's acts bind the 'principal' only in so far as they are within the authority conferred. Similar to an international organisation's constitutive instrument, a mandate given to an international administration acting on behalf of a territorial entity delimits its functions and powers. Unless it runs the risk of acting *ultra vires*, an agent representing a non-state territorial entity cannot perform functions or exercise powers other than those provided in the constituent document, nor convert functional means into purposes.<sup>945</sup> In this regard, it is assumed that a wrongful act of an international organisation is attributable to that organisation itself when the act is performed by the organs of that organisation or by its officials or agents acting in an official capacity.

International authorities may hence be bound to comply with governance standards arising from general principles of agency due to the fact that they exercise ultimate authority over a territory as a substitute for domestic authorities. The precise consequences of this assertion are, however, controversial. As one author already observed in 1950: "Responsibility derives from control the United Nations *may be expected to assume responsibility for acts of agents injurious to others*".<sup>946</sup> That raises difficult questions regarding the attribution of wrongful acts committed by the UN in the aftermath of a plenary international administration.<sup>947</sup> While a

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territorial government is, however, questionable. Ideas that involve the creation of a UN-wide Ombudsman along the lines of the World Bank Inspection Panel have recently been advanced by Zwanenburg (*Accountability*, *supra* note 615, at 317 *et seq.*) as well as by Mégret and Hoffmann ('The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities', 5 *HRQ* 314 (2003)).

<sup>945</sup> For *ultra vires* acts of international organisations see, in general, Lauterpacht, 'Legal Effect', *supra* note 668, 88 *et seq.* and Ueki, 'Responsibility', *supra* note 668, at 237-249.

<sup>946</sup> Clyde Eagleton, 'International Organisation and the Law of Responsibility', 76 *RCADI* 385 (1950), at 385 and 387. Eagleton introduced the criteria of 'control' in his seminal work *The Responsibility of States in International Law* (New York: NYU Press, 1928), at 26 *et seq.* (italics supplied). See also the intriguing discussions by Ueki, 'Responsibility', *supra* note 668, at 243; Zwanenburg, *Accountability*, *supra* note 615, at 135 *et seq.*; and Hirsch, *Responsibility*, *supra* note 889, at 64-77 (concluding that the principle that international organisations may be held responsible for their acts is part of international customary law).

<sup>947</sup> An example of an international organisation's direction and control in the commission of allegedly wrongful acts was envisaged, e.g., by the French Government in its preliminary objections in *Legality of Use of Force (Serbia and Montenegro v. France)*, when it argued in relation to KFOR that "NATO is responsible for the 'direction' of KFOR and the United Nations for 'control' of it" (Preliminary Objections, ICJ Reports [1999], at 33, §45). The UN is clearly capable of being internationally 'responsible' for an internationally wrongful act (*Manuel sur les organisations internationales* (Hague Academy of International Law, ed. by R.-J. Dupuy, The Hague: M. Nijhoff, 1988), at 887). It is however doubtful whether the UN can be held responsible for breaches of public international law perpetrated by its administrative authorities as the current legal framework limits the concept of attribution of wrongful conduct to *States*. Cf. Article 4(1) of the ILC Draft

substantive discussion of the liability of international organisations for internationally wrongful acts is beyond the scope of this thesis,<sup>948</sup> it is nevertheless crucial to emphasise one aspect that follows from the general rules covering agency in international law. The issue in question is whether an agent's responsibility (and putative liability for tortuous acts) will be restricted to the extent that the acts were directly performed by the 'principal'. In situations of co-government, in which the exercise of public power is shared between the international agent and local institutions, differentiating the source of responsibility will be difficult. The provisions of an international institution-building mandate, together with the agent's internal power-sharing agreement with local institutions delineating each sphere of competence that reserves to the agent some degree of residual power of control, may be the foundation for an international territorial administration's general liability for tortuous acts committed within its jurisdiction.<sup>949</sup> To escape this bind, a UN administration could claim a mere 'functional authority', i.e. one which is not a claim to ultimate authority over all matters within a territory, but only as regards the particular functions which fall within its asserted jurisdiction.<sup>950</sup>

Doctrine has not treated this problem unanimously. In analogy to the 'control theory' (developed by Ago with respect to the responsibility of a protecting state or a Mandatory power), the UN might also be liable for wrongful acts committed by local institutions in so far the international agent maintains control over, and could have prevented, their harmful legislative and executive acts. Such indirect liability may be 'objectively constituted', i.e., regardless of *culpa in eligendo* or *culpa in vigilando*.<sup>951</sup>

Arguments about the 'wrongfulness' of acts of the international agent – framed either in an

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Articles on Responsibility of States for Internationally Wrongful Acts (UN Doc. A/CN.4/L.602/Rev 1 (2001), approved by A/RES/56/83, 12 December 2001). For a survey of customary international law in the area of attribution of organisation conduct to member states see Zwanenburg, *Accountability*, *supra* note 615, at 72 *et seq.*

<sup>948</sup> See, in general, *Bowett's Law*, *supra* note 852, at 512 *et seq.* (with literature) and Mathias Hartwig, *Die Haftung der Mitgliedstaaten für Internationale Organisationen* (Berlin: Springer Verlag, 1991).

<sup>949</sup> Established in the *Mavrommatis Palestine Concessions* case, in which the PCIJ, after having noted that the obligations resulting from the engagements of Great Britain as Mandatory Power are obligations which the administration of Palestine must respect, added: "The Mandatory Power is internationally responsible for any breach of them since, under Article 12 of the Mandate, the external relations of Palestine are handled by it" (PCIJ (Ser. A), No. 2 (1924), at 23).

<sup>950</sup> With regard to the European Union's claim to exclusivity of jurisdiction (as opposed to the claim to finality of authority), this thought is advanced by Neil Walker in his unpublished paper 'Sovereignty, Global Security and the Regulation of Armed Conflict: The Possibilities of Political Agency', forthcoming in *The Politics of Protection* (ed. by J. Huysmans, Routledge, 2005).

<sup>951</sup> Roberto Ago, 'La responsabilità indiretta nel diritto internazionale' 1 *Archivio di Diritto Pubblico* 7-63 (1936), reprinted in *Scritti sulla responsabilità internazionale degli Stati* (vol. I, Università die Camerino, 1978), at 10 *et seq.* and 60. For a similar constitution of 'objective' liability in cases of asymmetrical relationships, see Friedrich Klein, *Die mittelbare Haftung im Völkerrecht* (Frankfurt, 1941), at 217 *et seq.* (protectorates) and 247 *et seq.* ('A'-Mandates). Verdross, on the other hand, endeavoured to limit the 'control theory' to behaviour with respect to areas in which control is effectively exercised ('Theorie der mittelbaren Staatenhaftung', *ÖZöR* 388 (1946-48)). Under the concept of limited liability, UN administration's responsibility for an internationally wrongful act could only be established if it was directly committed by one of its organs within its jurisdiction. A case in which this question could be contentious is the mixed international-local responsibility for the privatisation of 'state' owned assets in an internationally administered territory (such as Kosovo, *supra* p.179). Acting within the limits of the municipal power-sharing agreement with the international organ, the local government may engage its own responsibility, neither attributable to the international organ, nor to the 'sovereign' whose bare title to territory remains in suspension pending a final status determination. Given the fluid distribution of competences in an institution-building environment, responsibility for wrongful acts can be very much seen as a 'moving target'.



organic relationship that focuses on the lack of supervision by the mother organisation and the concomitant lack of accountability of the organ to it or in an agency relationship that seeks to impute wrongful acts to the international agent – are hypothetical as there are no precedents for holding an international administration responsible for breaches of international law.<sup>952</sup> The closest an internationally sanctioned fiduciary administration came to being held liable in legal terms was the case of post-colonial Nauru.<sup>953</sup> At any rate, the above analysis did not aim at an exhaustive treatment of the responsibility of international organisations (and thus of UN organs administering territories) – an issue currently under the consideration of learned bodies such as the International Law Commission<sup>954</sup> and the International Law Association.<sup>955</sup> We merely attempted to provide an additional perspective on the problem of accountability, the lack of which we held to be a property of an international-yet-territorial legal order.

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<sup>952</sup> The only possible scenario in which such a determination could be made would involve a request by the General Assembly (or the SC) for an Advisory Opinion in which the ICJ could pronounce itself on "any legal question" (Art 96(1) UN Charter) pertaining to "other organs of the UN and specialized agencies", hence also the normative acts of a UN mission, a subsidiary organ of the UN Secretary-General.

<sup>953</sup> Cf. *supra* p.131. The case was settled by the 1993 'Compact of Settlement' under which Australia agreed to pay Nauru compensation for the deposits extracted. For trustee responsibility in the environmental sphere cf. also Hyun S. Lee, 'Post-Trusteeship Environment Accountability: Case of PCB Contamination on the Marshall Islands', 26:3 *Denver JILP* 399-435 (1998). It is, however, worth highlighting that those claims were based on an alleged breach of the Trusteeship Agreement. This prevents us from drawing analogies to a situation in which an international administration's authority to temporarily govern territory is based on Chapter VII of the UN Charter.

<sup>954</sup> ILC Special Rapporteur Gaja has delivered the *First, Second and Third Report on Responsibility of International Organizations* (UN Doc. A/CN.4/532, 26 March 2003; UN Doc. A/CN.4/541, 2 April 2004; and UN Doc. A/CN.4/L.553, 13 May 2005 respectively).

<sup>955</sup> Cf. Report of the ILA Berlin Conference (2004), *Accountability of International Organizations*, printed in 1 *International Organizations Law Review* 221-293 (2004) (cf. particularly Part II, S.4 of the Report (at 251-253) which deals with temporary administration of territory).



### CONCLUDING APPRAISAL

At the end of his study on legitimacy, *Barker* notes that unless an author is "suddenly to do in five pages what he has failed to do in two hundred...", the conclusion must be... a necessarily didactic summary and an allusive indication of things undone."<sup>956</sup> Following these recommendations, this appraisal attempts to bring together the strands of a long argument by recalling the main themes. At the same time, it offers some concluding thoughts which transcend the preceding discussion.

The research puzzle required the application of four conceptual frames. In the first chapter, we viewed the methodology of internationalisation as the result of a transfer of *imperium* from a sovereign power to a protecting entity leaving the former with a claim as a 'bare title'. In the positivist framework, suspending sovereignty represents a legal process through which the conceptual hallmarks of *dominium* and *imperium* are divorced from each other. We discussed the processes and methods of transferring effective control and focused on territories under international administration as experimental models of restricted sovereignty. International legal sovereignty has increasingly been suspended by the SC by its reliance upon Chapter VII. Both UNMIK and UNTAET were created on the basis of Chapter VII of the UN Charter, and in both cases an international territorial administration assumed exclusive administrative authority over the territories placed under their effective control and supervision. Moreover, we established that the special normative quality of Resolution 1244 lies in its 'vertical' imposition of the transfer of effective control. This analysis allowed us to make normative statements about the *jus nudum* of a sovereign whose title had been suspended. Specifically, we likened the retained bare title of the sovereign to a state servitude in which the exercise of sovereign title to territory is voluntarily limited in favour of another subject of international law. In applying *ordre public* considerations, the internationalisation of territory by the Security Council's reliance on Chapter VII can be viewed as the imposition of a *temporary servitude juris gentium necessariae*.

The second chapter aimed at supplying a complementary theoretical framework to account for instances of suspended sovereignty. It posited that classical rules of international law – rooted in concepts of sovereign equality and bilateralism – were inapplicable once the notion of fiduciary administration entered the international system in the wake of the Versailles Treaty and once the promise of self-determination was recognised as an international entitlement. We argued that in periods of turbulent transition, international law reached beyond its basis and placed itself within a transitional paradigm in which the abstract dichotomy between sovereignty and self-determination was temporarily suspended. Grounded in principles of equity and morality, and devoted to the furtherance of social goals, fiduciary administration represented a new linkage between the instant in which sovereignty reposed in abeyance and the opportunities for emergent forms of legal creativity.

The analysis thus gradually shifted from a positivist ownership-based view to one that conceives of the trustee as internally bound in the performance of his trust – hence segregating this obligation from the title *in rem*. We further concluded that the revolutionary ICJ ruling of 1971 gave affect to a functional understanding of the inherent properties and promises of

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<sup>956</sup> *Political Legitimacy*, *supra* note 748, at 195.

fiduciary administration. The process of internationalisation of a territory through which an entity was to be directly administered by a subsidiary organ of the UN (the case of Namibia) necessitated the granting of *sui generis* legal personality to the territory on whose behalf the international organisation acted, thus further widening the gap between the application of rules of classical international law and the novel legal responses that the fiduciary administration had introduced. We concluded that fiduciary administration created the link between the agenda of state-building and the granting of a continuously growing share in the territory's administration under the banner of self-determination, with a policy of gradual detachment that differentiated various levels of development.

The concept of partial legal personality provided a third normative framework within which territories administered by the United Nations can be located. Three key argumentative steps were essential to determining the status of a non-state territorial entity in public international law. We proceeded from *Rechtsfähigkeit* to *Handlungsfähigkeit* and suggested that capacity to act on behalf of a territory can be vested in an international agent. Secondly, we defined agency as the relationship between the territorial agent and an entity that is under its temporary protection and established that in the case of UN interim administrations agency *ex lege* is assumed on grounds of necessity. In a tangent to post-structural positions, we further argued that personality is constituted through the 'texture' spun between the 'inside' of a non-state territorial entity and the 'outside' of the international legal order. A different ontological status is installed once the performative external acts of an international administration are accepted as legally significant in that they bind and commit the non-state territorial entity. Thirdly, we proposed that personality is, in the case of fiduciary administration, limited by the international agent's mandate.

One of the wider-ranging conclusions of Chapter III was that the quality of being a subject of international law can be attributed to any composite entity, *in vacuo*, thus relating it to other subjects as well as to the very legal order that identified its subjectivity and defined its characteristics. The performance of its subjectivity by an agent renders a non-state territory an international legal personality with the capacity to pursue its abstract 'interests' on the international stage. Following the precedent of international organisations, such limited legal personality must be defined in relation to the respective functions the subject in question fulfils with regard to the needs shared by the international society. Chapter IV suggested that, due to the convergence of municipal entitlements and their discharge by ancillary subjects of international law, such territories have both an international agent and a local government that make and apply law, and whose legal activism leads to an overlap of international and municipal normative spaces. The two case studies – Germany under Allied occupation and Namibia under the administration of its UN Council – revealed that an international administration acts as agent of the territory under its administration. We utilised the frame of 'dual functionality' as a device to disaggregate the agent and organic functions of an international administration, thus complementing the theoretical groundwork for the seminal case study of this thesis – Kosovo under international administration.

Chapter V first applied the framework developed in Chapter I to explain Serbia's *jus nudum* over the territory. Further, the discussion illustrated the extent to which a UN organ assumes agency and represents a territory in external relations, hence applying the core propositions of Chapter III. The case study also illustrated what we have earlier identified as one of the chief dilemmata of international law, namely its preference to stay clear of unequivocal

definitions of the respective units to which the principle of self-determination would apply, or the methods of its implementation. In a further step, we investigated certain aspects of the two-faced role of the UN as it administers territory and the inherent systemic constraints it encounters due to its open-ended mandate. We argued that the success of a conditionality policy is jeopardised when an international organ pursues the 'international public good' as well as the 'domestic interest' of the territory (as its agent of necessity).

Upon consideration, it is instructive to recapitulate that the first authoritative study on the topic defined internationalised territories as "populated areas, established for an unlimited period as special political entities, whose supreme sovereignty is vested in, and partly (or exclusively) exercised by, the supreme organisation of the international community, the [UN]."<sup>957</sup> The increasing willingness of the international community to utilise deep intervention and administration tools has motivated our attempts to sharpen this definition. Evidently, there cannot be a singular conclusion to the preceding explorations and the rough delineation of the properties of a territory subject to plenary international administration that has resulted from them. A more precise definition of the phenomenon of internationalisation shall, however, include the following elements:

**A. As to the legal status of the administering organ:**

1. An internationalised territory is subject to the interim administration of a subsidiary organ of an international organisation. This distinguishes it from a condominium where public authority is exercised by more than one state;
2. The international community 'lends' a civil and/or military organ to assume temporary administration tasks. In the framework of a Chapter VII authorisation, this subsidiary organ substitutes for domestic governmental institutions;<sup>958</sup>
3. The administration itself assumes dual functions: that of an agent appointed *ex lege* and tasked with the representation of the territory, and that of an international administrative organ.

**B. As to the title to territory:**

4. The internationalisation of territory on the basis of a Chapter VII mandate can be likened to the imposition of a *temporary servitude juris gentium necessariae* on the holder of the territorial title;
5. The creation of internationalised territories rests on multilateral instruments which may indefinitely suspend the exercise of sovereign rights. The UN organ assumes *imperium* over territory while competing municipal legal orders are derogated;
6. In the hiatus of international administration, the concept of indivisible sovereignty is inapplicable.<sup>959</sup> *Dominium* remains suspended and is temporarily replaced by the inter-

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<sup>957</sup> Yditi, *Internationalised Territories*, *supra* note 37, at 320. At that time of writing, another major study on the issue concluded that the term 'international administration' of territory had no fixed meaning in doctrine, hence "erübrigt sich eine Abgrenzung seines Wesens von dem der als Internationalisierung bezeichneten Erscheinungen" (Beck, *Internationalisierung*, *supra* note 82, at 76).

<sup>958</sup> Similar: de Wet, 'Administration', *supra* note 629, at 331.

<sup>959</sup> Similar already Beck in *Internationalisierung*, *supra* note 82, at 93: "Für das Völkerrecht kündigt sich in dieser Verteilung der Hoheitsrechte auf lokale Behörden und internationale Organisationen

national performance of trust.

**C. As to the extent/nature of powers assumed by an international administration:**

7. The international administration's authority over territory is comprehensive in terms of executive, judicial, and legislative competencies. The legal system thus established is hybrid. It is located at the normative intersection between international and municipal law. As a result of the collapse of the dualist separation between international and internal legal orders, international legal instruments have a 'direct' statute-like role in the domestic legal order of an internationalised territory;
8. Public order considerations support the argument that is the precise task of an international territorial administration to effectuate normative change through the overall reform in all areas of law. It is thus highly doubtful whether it is under an international legal obligation to observe the limits to the exercise of public power set by international humanitarian law, especially by Art. 43 of the Hague Regulations;
9. Detached from the context of decolonisation, an organ of the international community performs governmental functions 'in trust', that is, in the interests of the territory. The existence of a singular fiduciary bond between the administrative agent and the territory distinguishes the exercise of power from constellations under Mandate and Trusteeship Agreements in which the administering authorities also performed fiduciary functions with respect to the international community as a whole (sacred trust);
10. The international administration exercises fiduciary functions on a temporary basis in order to create stable and sustainable political units which shall, at the minimum, be in a position to exercise their right of internal self-determination. The primary purpose of such a transitional administration consists in the transfer of competencies to local actors that are to be established under the institution-building mandate. The legal basis of Chapter VII enables us to distinguish such administrative functions from constellations assumed under protectorate agreements.

**D. As to the legal status of the territory itself:**

11. Independent of the question of sovereign title, the concept of 'status' refers to a crystallisation of rights and obligations which one international legal person possesses towards another person, with respect to a specific territory.<sup>960</sup> Such rights and obligations do not stem from contractual obligations undertaken under 'horizontal' agreements. The legal status of an internationalised territory is mediated by an agent *ex lege*;
12. The international legal order reaches the object of its concern directly, through its organ, without the constraining mediation of a sovereign state structure. The territorial entity is endowed by international law with a set of entitlements and obligations

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und in der dadurch erzeugten gemeinsamen Verwaltung beider für die internationalisierten Gebiete eine neue Auffassung von den Beziehungen zwischen einzelstaatlichen Völkerrechtssubjekten und Organen der Völkerrechtsgemeinschaft an: die Konzeption der unteilbaren Souveränität wird, jedenfalls bei internationalisierten Gebieten geopfert, und an ihre Stelle tritt eine Verteilung der territorialen Rechte."

<sup>960</sup> Cf. Klein, *Statusverträge*, *supra* note 116, at 22, and Rauschning, *Status*, *supra* note 437, at 12-13.

(subjectivity) which it effectively discharges through this international agent;

13. International legal practices are constitutive of an avenue through which such entity connects to the international plane. The Security Council thus constitutes the spatio-temporal identity of a *polis*. Its international legal personality is limited by the international agent's mandate.

In all, the first five chapters presented a synoptic vision of the notion of internationalisation of territory and the extent to which it can be distinguished from projects undertaken under the Mandate- and Trusteeship systems. It utilised institutions of both private law (agency, trusteeship, servitude) and public law (wardship, the status of organs) to underscore that the dual set of fiduciary obligations undertaken by a state under the UN's Trusteeship system collapses into one as a UN subsidiary organ takes over the performance of the fiduciary bond towards the people under its administration. In this context, allusions to a supposedly novel institution of 'neo-trusteeship' do not take account of the major change in legal spheres that the increased willingness of the international community to interfere directly with the subjects of its concern, has brought about.

This thesis has, in any case, not attempted to provide ideas as to the amendment of the institutional design within which such territories shall be administered in the future – a task reserved to policy and legal advisers. A brief comment is, however, in order. Despite the conceptual differences between international and national territorial management projects, it has been suggested that the (now defunct) UN Trusteeship Council (TC) be used to 'deal' with 'failed states' as a new depository of trust. *Prima facie*, the idea that the states responsible for their administration should voluntarily place such territories under trusteeship – as provided for in Article 77(1c) of the Charter – appears reasonable. However, there are obvious legal obstacles that preclude an application of the Trusteeship system to UN member states. Such suggestions also fail to account for the Security Council's lack of competence to forcibly place a state under the jurisdiction of the TC.<sup>961</sup> Moreover, the mere resuscitation of the TC's 'dormant powers' would not meet the challenges identified by this thesis. It is, for instance, not immediately clear how a transfer of governance-related peace-building tasks from the UN Secretariat to the TC would remedy the problems flowing from the dual functionality of an administration, or those connected with an international mission's lack of accountability. Some of the most pertinent problems in international territorial governance are rooted in the genuine ambiguity of mandate and the institutional culture in which an administration mission is embedded. It is a truism to state that the UN's DPKO has experienced problems in planning and seeing through internationalisation projects. Yet this does not guarantee that the TC, or another body composed of government representatives (such as a standing committee responsible for overseeing UN-authorized civil administra-

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<sup>961</sup> As Stahn points out, the imposition of trusteeship status on a state might even go beyond what is permitted by Chapter VII, because Article 77 of the Charter makes it clear that territories can only be administered under this system when they have been placed there by means of an individual agreement with the UN ('Origins', *supra* note 516, at 119). Gordon also finds that "the Council may not strip a state of its statehood, sovereignty or government" ('Some Legal Problems', *supra* note 634, at 326). This conclusion must, however, be qualified. The absolute requirement of a trusteeship agreement with the territorial state cannot be interpreted as a genuine limitation on the actions of the Security Council in the context of its reliance on Chapter VII.

tions), could do a better job.<sup>962</sup> Those propositions would effectively reverse the experimentalism with which the competence to manage territorial internationalisation was wrought from the ambit of the General Assembly.

In order to summarise our findings of the final chapter of the thesis, it is not unhelpful to borrow a fine metaphor from *Schmitter*: there are three movements to a dance that frames our assumptions about normative change under the transitional administration of the international community. The *overture*, the illiberal, repressive past and the collapse of order spurred by conflict; the *intermezzo*, which is more compressed, consisting in the rapid deployment of procedural mechanisms to establish a democratic institutional structure; and the *finale*, often drawn out, in which democratic practices are transformed into democratic substance through the reform of state institutions and in which the target society undergoes a rapid transition in values.<sup>963</sup> In this final stage, the normative foundations laid by an international importing agent should provide the conceptual soil for the evolution of a political system in the post-administration phase. Democratic consolidation is regarded as achieved when codes of behaviour are enforced as a sanctioned institutional culture.<sup>964</sup>

The final chapter of the thesis approached the phenomenon of a legal and political order in the *intermezzo* where the international community is engaged in what has been termed an "enormous experiment in social engineering", involving the wholesale import of Western models of social, political, and economic organisation into a war-shattered theatre.<sup>965</sup> We firstly explored a process in which the transfer of legitimacy in accordance with this institution-building mandate is contested. As we have noted, the motivations underlying local challenges to the legitimacy of international political authority take different forms and shapes. They might adopt the language of the street, as they do when UNMIK's headquarter is besieged by protesters. They might arise in head-on confrontations in the Assembly or take the more civilised form of 'exchange of letters'. Challenges to the UN's political authority might also be mounted by seeking alternative political fora than UNMIK to preside over a political compromise.<sup>966</sup>

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<sup>962</sup> For the suggestion to create such a committee as a subsidiary organ of the Security Council cf. de Wet, 'Administration', *supra* note 629, at 339-40. Sweeping claims that the TC would be a "better organ to manage the governance tasks of contemporary peacebuilding" abound. Cf., *inter alia*, Saira Mohamed, 'From Keeping Peace to Building Peace: A Proposal for a Revitalized United Nations Trusteeship Council', 105 *Columbia LR* 808-840 (2005), at 823, and Tom Parker, *The Ultimate Intervention: Revitalising the UN Trusteeship Council for the 21<sup>st</sup> Century* (Norwegian School of Management Report No. 3/2003, 2003), especially at 43 *et seq.* for suggestions to amend the UN Charter. New international institutional arrangements for dealing with collapsed states are also pondered by James D. Fearon and David D. Laitin, 'Neotrusteeship and the Problem of Weak States', 28:4 *International Security* 5 (Spring 2004), 33 *et seq.*

<sup>963</sup> Schmitter, 'Democracy', *supra* note 19, at 53. See also Guillermo O'Donnell and Philippe C. Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (Baltimore, Md.: JHU Press, 1986), at 6. A similar sequence is drawn up by Samuel Huntington in his seminal *The Third Wave. Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1991), at 35 and by Thomas Carothers in 'The End of the Transition Paradigm', 13:1 *Journal of Democracy* 5-21 (2002), at 7.

<sup>964</sup> Samuel H. Barnes, 'The Contribution of Democracy to Rebuilding Postconflict Societies', 95 *AJIL* 86-101 (2001), at 92.

<sup>965</sup> Paris, 'Liberal Internationalism', *supra* note 24, at 56.

<sup>966</sup> This occurred when the Joint Declaration between Kosovo Albanian and Serb leaders concerning reconstruction and returns following the outbreak of communal violence, was signed in July 2004



A successful trustee will be expected to manage the anomalous phenomena of legitimacy, rather being forced into undignified retreat when the local population becomes unwilling to tolerate its continued supremacy.<sup>967</sup> The extraordinary 'legitimacy cycle' in Kosovo relates back to what we understood to be an inherent weakness of an international mission's mandate: an 'open-ended' deployment setting that facilitates the struggle to appropriate legitimising capital which, in turn, unsettles the transfer of legitimacy to an extent that the implementation of an institution-building mandate might be thrown into jeopardy. As Caron observes, perceptions of an international institution's illegitimacy can arise where there is great discrepancy between the expectations generated by its promises and what the institutions actually deliver.<sup>968</sup> The underlying paradox of international institution-building at the periphery can thus be framed in the following manner: as it administers a period of political flux into which it wishes to inject normative change, an international territorial administration does not submit to liberal constitutional principles – 'vertical' and 'horizontal' accountability, transparency and responsibility.<sup>969</sup>

In the second section of the final chapter, we concluded that normative change in an internationally administered territory is effectuated by the import and the subsequent superimposition of foundational concepts of an ideal-type 'Western' legal order. An institution-building mandate consists precisely in the creation of conditions under which those concepts are absorbed into local sub-cultures – presumably by a lengthy and gradual process. As exemplified by the case of UNMIK in its seventh year of operation, progress in absorption will be measured against similarly imported 'benchmarks'. Focusing on aspects of norm-building – which some authors refer to as the third transformation taking place in conjunction with developments in political and economic spheres<sup>970</sup> – we argued that a transitional legal order exhibits a number of specific properties.

Firstly, the body of applicable law is subject to immediate contestation within intrusive UN governorship operations, especially where the law applied prior to international intervention is considered to have been the tool of an oppressive government. Secondly, the operation of interlacing legal orders and hybrid sources of law supplied us with a powerful, though temporary, exception to the dualist separation of international and domestic law. Upon consideration, processes of internationalisation exhibit the most extreme range in an emerging spectrum where state constitutions have been 'opened' to the international community in general and international law in particular.<sup>971</sup>

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in the presence of the US and EU representatives, but without UNMIK. See the *Eide Report*, *supra* note 513, at 10.

<sup>967</sup> Perritt, 'Final Status', *supra* note 797, at 12.

<sup>968</sup> David D. Caron, 'The Legitimacy of the Collective Authority of the Security Council', 87 *AJIL* 552 (1993), at 559-61.

<sup>969</sup> On the general issue of the accountability of UN agencies and organs, see also August Reinisch, 'Governance Without Accountability?', 44 *GYIL* 270-306 (2001), at 279 *et seq.* On *ex ante* and *ex post facto* conceptualisations of accountability cf. Joy M. Monciéffe, 'Accountability: Idea, Ideals, Constraints', 8:1 *Democratization* 26 (2001).

<sup>970</sup> See Geoffrey Pridham, *The Dynamics of Democratization. A Comparative Approach* (London/New York: Continuum, 2000), Chapter VIII.

<sup>971</sup> For a discussion of the interaction between post-revolutionary democratisation and an 'opening' of new constitutions to the international legal system, cf. Antonio Cassese, *Modern Constitutions and International Law*, 192 *RCADI* 335-418 (1985-III), at 351-393. A thoughtful analysis of the extent to

The sixth chapter began by subscribing to what can be viewed as a stereotypical image of the *mission civilisatrice* and portrayed an internationally managed transition as a process through which a territory with an underdeveloped legal system adheres to a number of international instruments, thereby opening a whole new conceptual universe for its citizens.<sup>972</sup> Rather than looking at an institution-building mandate as a 'transmission belt' for shared beliefs held by international actors, we, however, depicted a 'de-sovereignised' territory as the site which is most receptive to manifestations of solidaristic principles. This is the location where we situate the international community's aspirations to emulate liberal-democratic principles in its institutional design and hence temporarily re-model itself in its own image. We continued by focusing on some of the difficulties emerging from the unmediated import of 'international standards' that are not tailored to UN-managed political transitions and noted that the peculiar 'curvature' of normative space – the fundamental indeterminacy of the body of applicable law, the gaps in statutory instruments and in human rights protection – exposes the frailty of transitory administration.

These observations also presented us with a paradox in which the machinery of a fiduciary administration, powered by the ideology of liberal internationalism, establishes a legal system where the liberal rule of law is itself subject to exceptions. The absence of a hierarchy of norms within an internationally administered territory means that rules for both the auto-production and this auto-review of law are missing.<sup>973</sup> We assessed this as having a deplorable effect on legal certainty. The incomplete reconstruction of liberal positions thus makes an internationalisation project suspect from 'within', as it does not import adjoining mechanisms to prevent the arbitrary exercise of authority under international tutelage. *Prima facie*, the continuing unsupervised authority of an international executive causes the very foundations of liberal notions of the rule of law to quaver. In this Schmittian rendering, a UN SRSG eclipses parliamentary law-making and legal adjudication as these avenues would, according to the UN's mode of thinking, be at times too susceptible to 'illegitimate' particularistic interests.

In order to demonstrate the conceptual linkage between the notions of legality and judicial review, we made further reference to two exceptional decisions by the Supreme Court of Palestine (in 1925), and the Bosnian Constitutional Court (in 2000), in which certain acts of an international importing agent were held to be subject to review. Absent comparable mechanisms foreseen for 'plenary' internationalisation projects, we suggested that the notion of 'legality' is particularly unhelpful as a means of specifically circumscribing the concept of 'authority'. In its wider significance, these gaps indicate that legal formalism is compromised by the operation of liberal internationalism and the foundationalist import of a rule of law which deviates from ideal conceptions. Remaining in the margins, the debate about the

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which Central European constitutions have been 'opened' to facilitate the import of international treaty law, customary rules and general principle in the period after 1990 is provided by Stein, 'Internal Law', *supra* note 850.

<sup>972</sup> For a criticism of such a stylised image being inadequate to grasp the complexity of the 'transplantation' process, see Hoffmann, *Transplantable*, *supra* note 855, at 221-222.

<sup>973</sup> Cf. Gunther Teubner's *Legal Autopoiesis and Legal Evolution* (EUI Colloquium Papers, Auto-poiesis in Law and Society, Doc. IUE 322/85, Florence, December 1985), at 8-15. As opposed to an autopoietic normative order which, according to Teubner, provides its unity by specifying its boundaries and regulating its own creation, a transitional legal order such as one created by a UN territorial administration must remain operationally open (owing to the collapse of the dualist frame) and systemically indeterminate.

'legality' of normative acts issued by an international territorial administration has certainly rejuvenated the human rights critique and has simultaneously substantiated the "otherwise curiously eerie debate on the applicability of human rights standards to the United Nations".<sup>974</sup> However, we proposed that this debate raises more questions than it set out to answer. In a reformulation of Derrida's cautioning against deconstructive 'models' of the political, warnings about the absence of 'legality' in the international system and hence in an internationalised territory resemble:

searchlights without a coast, they sweep the dark sky, shut down or disappear at regular intervals and harbour the invisible in their very light. One no longer even knows against what rocks or abysses they forewarn us. One no longer even knows whether these watchmen guide us toward another destination, nor even if a destination remains promised or determinable.<sup>975</sup>

A question we have not yet attempted to answer – and which projects some of the conclusions reached in section 2 against those of section 1 of the final chapter – is the following: does such unaccountability create gaps in an international administration's 'domestic' and 'international' legitimacy? Constitutionalism comes as a ready answer to those challenging the legitimacy of an international territorial administration. The notion appears to promise more than just the *ultra vires* doctrine and the notion of conferred powers, or checks and balances – "it promises all of these together, in a comprehensive package".<sup>976</sup> According to this liberal orthodoxy, only constitutional regimes can bestow legitimacy on a political system in search of that very commodity. This thesis finds itself in disagreement with some of these sweeping propositions. As a matter of observation, only a few manifestations of local discontent concern themselves with the functional immunity of international officials or an administrative machinery which screens itself from domestic complaint procedures and which is not subject to independent judicial control.

The construction of a legal order which has a temporarily limited sphere of validity under an international institution-building arrangement is, as we have concluded, a task that has to reconcile interlocking normative systems stemming from discrete constitutional sources. Given the problems in 'translating' concepts of accountability and the separation of powers into the context of an internationalised territory, the current critique – launched from the heights of Western constitutionalism – of the UN and its incarnations as territorial administrators of Kosovo and East Timor does not fully do justice to the political imagination inspiring an internationalisation project. The use of international authority to temporarily substitute for 'authentic' constitutional orders represents a radical experiment with new tools of the international order within the domestic sphere. By delegating legislative powers to an international territorial administration, the international community has acquired the capacity to work directly at the level of norms and institutions.<sup>977</sup> It thus lends practical expression to the concept of international concern for what was once called 'dependent peoples' through which "all members of the organisation are jointly and severally responsible for the fulfilment

<sup>974</sup> Mégret/Hoffmann, 'Violator', *supra* note 944, at 333.

<sup>975</sup> Jacques Derrida, *Politics of Friendship* (New York: Verso, trans. by G. Collins, 1997), at 301.

<sup>976</sup> Jan Klabbers, 'Constitutionalism Lite', 1 *International Organizations LR* 31-58 (2004), at 45 (adopting an admirably ironic perspective on the issue of constitutionalism facing international organisations).

<sup>977</sup> Cox, *Bosnian State*, *supra* note 23, at 112.

of the sacred trust".<sup>978</sup> Limitations to international territorial government might set overly strict standards which – given the extensive mandate to steer normative change – transitional administrations cannot live up to.

Mirrored against versions of constitutionalism familiar to Western lawyers, these deficiencies undoubtedly raise grave unease as to the propriety of international legislative acts and, probably more worryingly, concerning the level of human rights protection in an internationalised territory. In a post-authoritarian society, however, the import of such notions is only gradually absorbed and fails to give rise to organised dissent in the domestic arena. It may therefore be argued that the elaboration of democratic rules and their diffusion is *integral to the transition itself*. Imported versions of the rule of law cannot create a moral community because for its proper functioning it requires the existence of such.<sup>979</sup> For it to receive meaning, the rule of law depends on the existence of an institutional and political culture – the point of departure for every UN transitional administration. In the parenthesis of an international administration project, institutional and legal arrangements always entail a loss of certainty and liberty. As *Bain* notes, a ward must be coerced, just as parents coerce their children, towards some good for the sake of his own happiness.<sup>980</sup> The issue in Kosovo, it must be stressed, is not dissatisfaction with the clash between the coercive model of institution-building and conceptions of freedom but whether such perceived paternalism is, in the eyes of those subject to tutelage, the most expedient means to make the population fit to face the 'strenuous conditions of the modern world'.

To state it provocatively, much of the conventional unease voiced in recent international peace-building literature concerning the opening of a protection gap in which an international territorial administration would be operating appears moot when viewed through the lens of an international administration's domestic legitimacy. The immunisation of law from democratic politics only marginally affects the perceived quality of its exercise of power.<sup>981</sup> This is especially the case in a setting in which derogations from the participatory model of administration can be justified by reliance on emergency powers. The core questions here concern the issue of whether the paternalistic impulse (which runs deep in an internationalisation project) is based on an imperative of 'strategic liberalisation' and whether it is *justifiable* in terms of the prevalent beliefs and values held in the target society. As evidenced by the case of Kosovo under UNMIK rule, justifiability is certainly enhanced when an international administration is seen to act in consistency with, and perform, what we have termed the territorial interests of the entity under its tutelage. Simply put, when an international administration behaves as ordinary government.

Moreover, we noted that international political scrutiny of an international organ operating in an internationalised territory aims at nothing less than ensuring, through political rather than legal means, that its practice complies with a particular system of good governance, forcing

<sup>978</sup> Judge Bustamante, ICJ Reports 1962, *supra* note 192, at 355.

<sup>979</sup> Adapted from Koskeniemi, 'Legitimacy', *supra* note 827, at 367.

<sup>980</sup> 'Twilight', *supra* note 771, at 51.

<sup>981</sup> This challenges the opinion of commentators who believe that the absence of mechanisms to review UNMIK acts undercuts the internal legitimacy of political trusteeship (e.g., Peritt, 'Judicial Review', *supra* note 720, at 2). I am regrettably unable to provide empirical data to support this hypothesis. I have drawn these conclusions from observations in the course of four years of professional experience in BiH and Kosovo.

it to employ strategies of justification and legitimisation towards the international community. The absence of constitutional limits to the exercise of international political power can also spill into the international domain and mobilise serious discontent among the global political and diplomatic constituency. Failure to justify its coercive measures arguably presents a far more serious challenge to an international territorial administration's legitimacy than that presented by local stakeholders. Consider a Report by the Council of Europe's Parliamentary Assembly which, regarding the continuation of international authority in BiH, concluded that the OHR constitutes

the supreme institution vested with power in Bosnia... In this connection, the Assembly considers it irreconcilable with democratic principles that the OHR should be able to take enforceable decisions without being accountable to them or obliged to justify their validity and without there being a legal recourse.<sup>982</sup>

It remains conventional wisdom that international administrations cannot be expected to "possess the qualities of a democratically elected legislative branch."<sup>983</sup> Acceptance of the collapse of key categories of constitutionalism such as legal certainty, the protection of fundamental rights, and the separation of powers would however make our analysis vulnerable to implications that we acquiesce in decisionism. We did not intend to insinuate this. Advocates of executive detention orders and opponents of judicial review of other normative acts should certainly not be given the benefit of the doubt. History, as *Alvarez* points out with regard to national legal orders, does not demonstrate that systems characterised by heterogeneity cannot have a functioning judiciary capable of some constitutional review.<sup>984</sup> It is hard to make the case for constitutional reform in, say, Russia and yet refrain from applying similar standards to a subsidiary organ of the UN Secretary-General.

Against this background, the question of the review of international administration measures is one that should be explicitly dealt with in the respective Security Council Resolution establishing such a temporary regime. Whether this power should be accorded to domestic courts within the internationalised territory or whether international administrations should create mixed review bodies for this purpose is a discussion which lies outside the purview of this thesis.<sup>985</sup> By way of conclusion we may note that in the face of increasingly intrusive international power, arguments in favour of the partial re-construction of dualism are steadily gaining plausibility. Building on the dicta of the BiH Constitutional Court in the cases U 9/00 and U 25/00,<sup>986</sup> acts of international administrations should be reviewable in instances in which they replace the functionally competent local organs – where they act, according to the

<sup>982</sup> Article 13 of Resolution 1384 of the Council of Europe Parliamentary Assembly (20<sup>th</sup> Sitting, 23 June 2004). The Resolution asks the Venice Commission "to determine how far [the OHR's] practice complies with the Council of Europe's basic principles, and in particular with the [ECHR]." For a relatively comprehensive, though outdated, enumeration of OHR-imposed legislation, cf. Agata Dziwulska, *Peace-Building in Bosnia: Putting Theory into Practice* (Ph.D. thesis, on file with the EUI Florence, 2004), 203-244. The CoE PA has also a tradition of urging UNMIK to apply and to promote relevant CoE legal instruments. See, e.g., CoE PA Resolution 1375 (14<sup>th</sup> Sitting, 29 April 2004), §5.

<sup>983</sup> Marshall/Inglist, 'Disempowerment', *supra* note 837, at 117.

<sup>984</sup> 'Security Council', *supra* note 931, at 37.

<sup>985</sup> For proposals delineating powers of judicial review which could be incorporated into the legal framework of ongoing political trusteeships, see Peritt, 'Judicial Review', *supra* note 720, at 68 et seq.

<sup>986</sup> *Supra* notes 919 and 926.

terminology adopted in this thesis, as territorial agents. According to this dualist understanding, measures of substantive substitution (*materielle Ersatzvornahme*) – i.e., instances in which the international administration acts within the sphere of a competent national organ – could be nullified by a Constitutional Court if they are not in line with the distribution of powers laid down in the local constitution or if they are in breach with other substantive provisions.<sup>987</sup> The partial review of the powers of an international organ would thus limit its *Kompetenz-Kompetenz* in the field of normative action. International authority would have to respect the legal limitations which are equivalent to those competent national organs are constitutionally required to honour.

Recent institution-building mandates are founded on evolutionary models of democratic self-government. We have argued that concepts of democratisation and institutional reform are embedded in a mandate of promoting normative change through various techniques of 'norm-building'. The associations used to characterise such internationalisation projects – 'benign imperialism', 'autocracy', 'dictatorship of virtue'<sup>988</sup> – are unable to capture its essential characteristics. They misrepresent the extent to which the international community has undertaken to perform thick moral obligations, towards itself and the people under its temporary administration. The picture that emerges from this thesis is therefore neither simple nor unidirectional. If anything, it points at an international territorial administration's uncomfortable and paradoxical *Selbstverständnis* as it adopts what has been termed 'constitutionalism lite'.<sup>989</sup> International importing agents are profoundly aware that their ambitious goals cannot be fully realised within the ambit of liberalism's strong critique of unchallengeable political authority. Their exercise of power is, very much to the chagrin of constitutionalists, markedly distrustful of democratic politics and remains vulnerable to strands of exceptionalism and domination in the pursuit of a modernising – and indeed liberalising – agenda.

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<sup>987</sup> This presupposes that the respective *compétence d'octroyer* (say, the power to issue a directive to dismiss a local official) is actually foreseen in the body of local law. Cf. Steiner/Ademović, 'Kompetenzstreitigkeiten', *supra* note 919, at 125-26, with reference to the infamous *Bičakčić* case.

<sup>988</sup> Cf. the introduction to this thesis, p. 13.

<sup>989</sup> *Supra* note 976.

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